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FOR BOOKS RELATING TO
POLITICS AND FINE ARTS



W. Grapel

Aug 1855

Valentia

د. محمد علی

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RESEARCHES,

HISTORICAL AND CRITICAL,

IN

, MARITIME

INTERNATIONAL LAW.

BY JAMES REDDIE, ESQ.,

ADVOCATE,

**AUTHOR OF "INQUIRIES IN THE SCIENCE OF LAW," AND OF "AN HISTORICAL VIEW
OF THE LAW OF MARITIME COMMERCE."**

VOL. I.

EDINBURGH:

THOMAS CLARK, LAW BOOKSELLER.

BENNING & CO., BIGG & SON,

WILLIAM BLACKWOOD & SONS, LONDON.

MILLIKEN, DUBLIN.

MDCCCXLIV.

Handwritten:
= II,

PRINTED BY GEORGE RICHARDSON.

Handwritten:
35-61
H2-2

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PRELIMINARY OBSERVATIONS.

IN consequence of the sufferings inflicted upon the different European nations, and the exhaustion experienced by them, during the French revolutionary war, renewed, or rather protracted by the insatiable ambition of Napoleon, by the long series of his unprecedented military achievements, and by his persevering, and nearly successful attempt at universal conquest and dominion, the governments of Europe appear to have, for some time past, become more disposed to peace and pacific measures, than for centuries preceding.

The recent alarm of war, too, arising out of the objections made by the French and Americans, to the right of reciprocal visitation of merchant vessels by national ships of war, which had been introduced by treaty, for the purpose of more effectually suppressing the odious African slave-trade, has passed away. And there is now happily the prospect of a continuance of that peace, in which all nations must so cordially rejoice.

In such times of peace, of course, much less interest,

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Another charge is the introduction of what is called a new rule by the British prize courts; by which neutrals are not allowed to carry on during war, the coasting, or colonial trade of the enemy, from which they were excluded during peace. But upon investigation, it will be found, there was here no departure whatever from an old rule, and no introduction of a new one. For with regard to the coasting trade, so far back as the 16th and 17th centuries, the reigns of Henry IV. of France, and Charles II. of England, the carriage of hostile goods by a neutral vessel from one port in the territory of the enemy to another port in that territory, especially if accompanied with fabricated ship's papers, appears to have been held sufficient to infer the confiscation of the neutral vessel; a penalty, which in later times, has been softened and relaxed into the forfeiture of the freight only.* With regard again to the colonial trade, the case, or species facti, does not appear to have previously occurred in the intercourse, pacific or warlike, of other European states, having colonies or dependencies in the other quarters of the globe. And as the application of an old rule to the decision of a case, for the first time emergent, is not in the private law or jurisprudence of a nation, usually accounted or called the introduction of a new rule; as little, in international law, can the denomination of a new rule be correctly given to the application of the old rule, which imposes on neutrals the obligation, not to interfere between two nations at war, so as to afford direct protection and benefit to the one, and so far to defeat or diminish the effect of the hostilities of the other. The reason, too, why this case had not occurred sooner, appears to have been, that neutrals had not previously so far departed from their

* Rob. Adm. Rep. VI. p. 74, 75, 76.

impartiality, and laid aside their neutral character, as in addition to carrying on their own accustomed trade with the enemy, to attempt, also, to interpose their services, by carrying on the peculiar trade of the enemy between the mother country and her colonies, from which trade they had been all along excluded, and to which they were admitted only after the enemy had been disabled from exclusively carrying it on himself, solely and entirely, by the military operations of the opposed belligerent.

But, while we think the course followed by the British prize courts, in the two cases last alluded to, will be found in the sequel, to have been consistent with the dictates of impartial justice, and correct legal principle, as well as with the ancient common consuetudinary law of nations, we are not so much under the influence of national bias, as to consider even Lord Stowell as being infallible. Now, that the temporary excitement of these times has long ago ceased, we may think, as Lord Brougham and Lord Ashburton did, at the time, that the British government, in their orders in council, which were not properly an extension of the system of blockade, but a general retaliatory interdiction of all commerce with the enemy, such as that of 1689, without an actual blockade, joined with the unavoidable consequent licensing system, erred, inasmuch as these measures were not well calculated for the attainment of the object in view. And we may also most respectfully inquire, whether Lord Stowell did not also err in thinking, if he did so think, for he has not distinctly said so, that this general interdiction of commerce with the enemy, admitted by him to have been "a great and signal departure from the ordinary administration of justice in the ordinary state of the exercise of public hostility," although clearly warranted as a retaliatory measure, so far as directed against the enemy, was

equally legal and justifiable as directed against neutrals, unless the neutrals either positively and expressly, by treaty or public declaration; or positively, though tacitly, *rebus et factis*, by their conduct, in adopting his plans; or at least negatively and passively, by submitting, from weakness and intimidation, to his unjust demands, had in fact surrendered the character of independent states. What neutrals agree or consent to submit to, from the one belligerent, they must also submit to from the other belligerent; for otherwise they relieve the former from the operations and pressure of the war, to the manifest detriment, and direct damage of the latter. But so far as neutrals did not abet, or acquiesce in, and submit to, the Berlin and Milan decrees, it does not appear that the British retaliatory measure, though quite just against the enemy, could, upon correct legal principle, be enforced against neutrals. And we humbly conceive, Lord Stowell erred, so far, as he held the orders in council were to be enforced, in such cases, or to such an extent. But it is not surprising if that most able and upright judge felt the extreme difficulty of deciding contrary to what had become, *pro tempore*, the law of his own country. In enforcing that law, he did no more than what that able lawyer, M. Valin, had previously declared to be the law and practice of France.* Perhaps, however, the higher course for Lord Stowell to have taken, as a judge of the law of Nations,—a course quite consistent with his usual spirit of judicial independence, and complete impartiality, would have been, to refuse to give effect to the orders in council, in cases where neutrals had not, like most of the continental powers, after the peace of Tilsit, aided and abetted, or acquiesced in, and submitted to, the decrees of Berlin and Milan. For with reference to these decrees

* *Traité des Prises*, chap. V. lect. V. § 5.

of the French emperor, as justificatory of the British temporary and conditional retaliatory measure of reciprocal non-intercourse, in so far as directed against the enemy, but not against neutrals, Sir Wm. Scott had himself observed, on the occasion of a similar, though much less aggravated infringement of the law of nations by the same power—"The true mode of correcting the irregular practice of a nation, is by protesting against it, and inducing that country to reform it. It is monstrous to suppose, that because one country has been guilty of an irregularity, every other country is let loose from the law of nations, and is at liberty to assume as much as it thinks fit."* And in the celebrated report, transmitted to the king of Prussia, drawn up in 1753, by Sir George Lee, and three other eminent English lawyers, including Mr. Solicitor General Murray, afterwards Lord Mansfield, the British government had publicly announced, that all captures at sea must be judged of by the prize tribunals, established by each country, according to the law of nations, and particular treaties, as distinct from the internal or municipal law of the belligerent state. Nor does it appear, the concession of such power to the higher international judges, of the legality of captures in Maritime war, would be attended with inconvenience. It rather appears it would operate beneficially, in causing the executive or administrative branches of civilized governments, to abstain from issuing any previous instructions or orders to their cruisers, which they might have any reason to believe could not be legitimately supported by the judges of their own prize tribunals.

Farther, the British orders in council during last war, appear to have deviated from the strict principles of the law of nations, in as much as they declared purchases

* The *Flud Oyen* Rob. Adm. Rep. 1, p. 142.

by neutrals, from the enemy, of British vessels captured as prize, to be illegal. The object of this declaration was, it is believed, to put an end to the then very frequent fictitious and fraudulent sales of such prizes by the enemy to neutrals, without any price being paid, or value given in exchange, solely for the purpose of protecting these still hostile vessels against British cruisers. But on strictly correct legal principles, perhaps all the length the orders should have gone, was a requisition upon neutrals, in possession of such prizes, to produce evidence of a *bonâ fide* purchase, or actual transfer, of the property, or interest, in such vessels.

Thus candidly admitting the errors of the British government, where that government appears to have deviated from the true and genuine principles of international law, and supporting the conduct of that government in the exercise of the rights, which appear to belong to the British, as well as to all other independent nations; we do not yield in sincere and ardent desire for the cultivation of peace, or in zeal to promote the cause of humanity, by limiting and softening the rigours of war, either to the modern amiable philanthropists, who anticipate a perpetual peace as now attainable; or to the professional advocates of neutral trade, who declaim so eloquently on the alleged greater horrors of Maritime, than of Continental warfare, and arrogate to themselves such great merit for propounding a scheme, which would, they say, put an end to all such abuses and evils. We no doubt reject and resist the adoption of the proposed scheme,—the concession of the pretended privilege of neutrals to protect the moveable property of belligerents against reciprocal hostile seizure at sea; because the scheme, in a physical point of view, is not founded in nature or fact, but merely on fiction; because it is inconsistent with the rules of justice, moral or legal, in

as much as it enables third parties to interpose their services between nations struggling for the enforcement of what they believe to be their respective rights, to the effect of counteracting and defeating the military operations of the one antagonist against the other, and thereby depriving one of the two of its means of obtaining justice, and consequently prolonging the state of hostilities. But while, for these and other such reasons, we reject the concession of this pretended privilege, we humbly conceive, that by tracing them to their causes, equally efficacious remedies may be found for such evils as really exist, without doing injustice to any party.

It is manifest, that among such a congregation of nations as the European, such near neighbours, so intimately connected, and having such constant intercourse in Maritime commerce and otherwise, no two nations could or can exercise their undoubted rights of self-defence against each other, or of vindicating their independence, and what they conceive to be their other just interests, without the relative position and condition of the other nations, not engaged in the contest, being thereby affected. But it would be absurd to maintain, that, on the part of the latter as neutrals, there exist nothing but rights; and on the part of the former, as belligerents, nothing but obligations. Each of these classes of nations have confessedly their respective rights; the Belligerents to seize and capture, as prize, the property of their enemies; the neutrals to carry on commerce with these enemies, who may be their friends. But it appears to be an universal principle of law and natural justice, that when two adverse rights come into collision, the right, the damage arising from the non-enforcement of which, admits of adequate or nearly adequate reparation, ought to yield, and to be suspended and postponed to the exercise of the other right, of which

the non-enforcement does not admit of any adequate compensation. And upon this footing, the interests of neutrals appear to have been to a great extent already secured, by the measures which the European Maritime nations have concurred in adopting; by their general proclamations and declarations at the commencement of wars; by their special instructions to their cruisers at the commencement, and in the course of these wars; and by their establishment of impartial prize tribunals.

That the observance, however, of the rules of law and justice in relation to neutrals, may be still more effectually, if not completely secured, there seems to be reason to believe. And as the alleged infringements of these rules, so clamorously complained of in certain quarters, appear to have originated partly from omissions, partly from culpable acts on both sides, the ulterior measures to be adopted, the legal duties to be performed, for the attainment of so desirable an object, are obviously incumbent on both parties—on neutral, as well as on belligerent governments. The latter may and ought to take care, that their proclamations and declarations shall be, in all respects, in strict conformity with the rules of Maritime international law, as now recognized in practice. They may, and ought not only themselves to observe, but to enforce all the moderation practicable, and particularly abstinence from all hostilities, which are not necessary for the attainment of the object of the war, and particularly from those which have no other tendency, than to gratify animosity. They may and ought to maintain a still more strict superintendence over the commanders of their cruisers, national and private. Nay, were we like the advocates of unlimited neutral trade, to indulge in speculations with regard to what might be a beneficial rule in this respect, without considering whether in law and justice, nations could be

expected, or compelled to adopt it, we would venture to suggest, as a more efficacious remedy for the evils complained of, than any admission of the pretended privilege of neutrals—the abandonment by all civilized nations, of the system of private Maritime warfare—the universal abolition of all *Armemens en Course*, or privateers—the limitation of Maritime hostilities to national or state ships of war. The officers of such ships would be much more under the control of the government; and would be comparatively free from that thirst of gain, which, while it strongly impels neutral merchants, ship-owners, and other adventurers to the commission of frauds, likewise impels the owners and fitters-out of privateers, and their crews, to occasional acts of injustice and oppression. And of such a limitation of warlike operations at sea, no nation could justly complain; because it would equally affect them all; like the abolition throughout Christendom of the barbarous practice of putting prisoners of war to death, or reducing them to slavery; or the abolition of the use of poisoned weapons. But, unfortunately, as Sir Leoline Jenkins observed, so long ago as the reign of King Charles II., “The privateers in our wars, are like the Astrologers (*Mathematici*) of ancient Rome—a sort of people that will be always found fault with; but still made use of.” Wynne’s *Life*, vol. II. p. 714. And it is perhaps to be regretted, that the use of this mode of warfare, like the capture of the property of the enemy, when in the course of passage, or conveyance, on the open seas, is a right emanating directly from the natural and primary law of nations; and that, therefore, its abandonment can only be effected of consent, and by a general convention among all civilized nations.

On the other hand, the neutral governments of civilized nations, ought not to encourage, or connive at, or tolerate the frauds, which, experience proves, are so

frequently committed by neutral mercantile adventurers in time of war. They ought, by suitable instructions, to make their merchants, ship-owners, and ship-masters aware what commodities they are not permitted to convey to either belligerent, and what voyages they are not permitted to undertake, according either to existing particular treaties, or the general common consuetudinary law of nations; and when frauds are detected, to punish such offences with rigour. In this respect Denmark appears to have set a laudable example to the other usually neutral European governments. And when such instructions are given, and superintendence maintained; or when neutral merchants, ship-owners, and ship-masters, act *bonâ fide*, the damage and inconvenience to which they are exposed, in consequence of war arising among their neighbours, by the capture of hostile property which they have taken on board their vessels, or even by the confiscation of the contraband goods which they may be found in the course of conveying to the enemy, will be found, in fact, to be inconsiderable, if not trivial. But if neutral merchants and ship-owners will, for the sake of gain, persevere in fraudulent schemes to cover the property of the enemy, they cannot in justice complain, should such fraudulent devices, which occasion all the embarrassment and difficulty in distinguishing neutral from hostile property, be detected and exposed, by the discernment of intelligent judges in the prize courts of the belligerent nations.

Entertaining such views, we have not, in the following inquiries, confined ourselves to British authorities merely, or like Mr. Chitty, almost solely to the judicial determinations of Sir W. Scott, however admirable; we have thought it right to look abroad into the ordinances and practice of other nations in this department of law, and into the works of their most eminent international jurists. Of these

different jurists, we were not to expect impartial views among the comparatively recent *ex parte* advocates employed by certain governments, to maintain and promote doctrines, in which these governments had a political interest, such as the writers in support of the scheme of the Russian Empress Catherine, usually denominated the "Armed Neutrality, or the Abbate Galiani, who admits '*un irresistibile comando ha prodotto quest' opera*,' or Piantanida, the "*ossequiosissimo servo e suddito*" of Napoleon; nor among those German and Danish professors and lawyers, who undertook the cause of the neutral mercantile interest of the northern kingdoms and states, such as Büsch, de Steck, and Schlegel. But it will appear, in the course of the following inquiries, that some of the ablest, most acute, and soundest of the recent continental jurists, in the south, centre, and north of Europe, such as Lampredi, Azuni, Tetens, Jacobsen, and Schmalz, approve of the doctrines of their predecessors, Grotius, Cocceii, Heineccius, Bynkershoek, Wolfius, Vattel, on the several points in which the British administration of Maritime prize law, has, in later times, been mainly challenged, with the exception always of the temporary and conditionally revocable non-intercourse declarations in the course of last war; and that one of these jurists, M. Tetens, gives a scientific exposition, in a statesman-like manner, of the grounds in reason, law, and general expediency, on which he continues to support these long recognized doctrines.

In our review of the principal works on Maritime international law, which have appeared since the middle of the 18th century, and in which chiefly a difference of opinion first prevailed with regard to the relative rights of belligerents and neutrals, we have endeavoured to avoid, as far as practicable, the keenness of feeling incident to a party in a controversial discussion; and to set

off the views and arguments of the one class of Continental writers, against those of the opposite class; if not to the effect of refutation on each point, at least to the effect, we hope, of enabling the reader to form an impartial and sound judgment.

In some instances, however, as in that of the pretended privilege of neutrals to protect the property of the enemy at sea, we have found it necessary so far to enter into the controversy, and to state our views in point of fact, and reasons in law, against the admission or recognition of that claim, except in virtue of special treaty agreeing to limit the common law right of the belligerent. And in endeavouring to refute the arguments urged by some more recent French and German writers on that subject, such as Rayneval and Holst, we may have occasion to dispute the correctness of assumptions in point of fact, and to ascribe the views taken, to the influences which prevailed at the time they wrote—to the influence of the mercantile interest in the northern kingdoms and states—and to the political influence of the then existing government in France, in accounting for the new doctrines adopted by some recent French writers, in opposition to the opinions of their most eminent lawyers of the 18th century, and contrary to what for ages had been the practice of that kingdom, in the administration of Maritime prize law.

But in combating these new doctrines, and occasionally pointing out the greater severity, in some points, of the prize law codes of France and Spain, than of that of England, we have entertained no feelings of national animosity. There is no class of the inhabitants of the civilized world, for whom generally we entertain greater respect, than the lawyers of France, to whom we are indebted for so many monuments, not merely of extensive erudition, but likewise of acute discrimination and

accurate reasoning, conveyed in neat and perspicuous language. And rejoicing in the present amicable relations between the two countries, we trust the educated classes, and generally the higher and middle classes in both kingdoms, satisfied with the military glory already attained by both nations—the one by land, and the other by sea—will direct their future rivalry to the advancement of art and science, to the cultivation of enlarged pacific views of national prosperity, and to the adoption of such reciprocal arrangements, without the slightest sacrifice on either side of any legitimate right, as may settle debateable points; and while they thereby diminish the risk of war, may, at the same time, alleviate the mode of conducting hostilities, if ultimately found unavoidable.

Finally, from the recent discussions between the British, and the French and American governments, on the subject of the right of search, as applied to the abolition of the African slave-trade; and from the tone and temper recently displayed on that subject by the French and American press, there seems to be reason to suspect, that, since the general peace of 1815, the opinions of the generation which has, in these countries, grown up in the interval, relative to Maritime international law generally, and particularly with regard to the leading questions between belligerents and neutral states, has been formed, very much, upon the *ex parte* treatises before alluded to, of Hübner, Galiani, Piantanida, Rayneval, and the author of the *Traité Complet de Diplomatie par un ancien Ministre*. And, if this suspicion be well founded, it affords an additional reason for a more fair and impartial investigation, and for bringing more into notice the valuable works of Lampredi, Tetens, Jacobsen, and Schmalz, as containing more disinterested, correct, and profound views of the science.

In such matters, of course, no deference is due to the

off the views and arguments of the one class of Continental writers, against those of the opposite class; if not to the effect of refutation on each point, at least to the effect, we hope, of enabling the reader to form an impartial and sound judgment.

In some instances, however, as in that of the pretended privilege of neutrals to protect the property of the enemy at sea, we have found it necessary so far to enter into the controversy, and to state our views in point of fact, and reasons in law, against the admission or recognition of that claim, except in virtue of special treaty agreeing to limit the common law right of the belligerent. And in endeavouring to refute the arguments urged by some more recent French and German writers on that subject, such as Rayneval and Holst, we may have occasion to dispute the correctness of assumptions in point of fact, and to ascribe the views taken, to the influences which prevailed at the time they wrote—to the influence of the mercantile interest in the northern kingdoms and states—and to the political influence of the then existing government in France, in accounting for the new doctrines adopted by some recent French writers, in opposition to the opinions of their most eminent lawyers of the 18th century, and contrary to what for ages had been the practice of that kingdom, in the administration of Maritime prize law.

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of his time to the study of that department of law. Early taught by the friendly advice of that talented and accomplished lawyer, the late Lord Cullen, to trace in the decisions of our courts, and in our practice of the law, the principles on which they rested, or ought to rest, the author, while still a young man, became pretty familiarly acquainted with those discussions, which from the ages of Grotius and of Pufendorff, were comprehended under the vague and indefinite appellation of the law of nature and nations. From this circumstance being known to his contemporaries, and from the friendly recommendations of the Right Honourable Charles Hope, then Lord Advocate, and afterwards, for so many years, the highly respected Lord President of the Court of Session, he came to be professionally employed in several of the few Maritime prize causes which at that time still continued to be adjudicated in Scotland; and thus had his attention particularly directed to practice in that department of admiralty jurisdiction. For while a separate independent state, Scotland had, like the other Maritime kingdoms of Europe, a prize jurisdiction, vested, in the first instance, in the High Court of Admiralty, and by appeal, in the Lords of Council and Session, as coming to a certain extent under the arrangement of King James V., in the place of the King's Privy Council; which, in England, to this day, exercises a corresponding jurisdiction through the medium of the judicial committee of its members, called the Lords Commissioners of Appeal in Prize Causes. After the union of the crowns, this prize jurisdiction still continued to be exercised in Scotland. And, the title on Reprisals and Prizes, in Lord Stairs' Institutions, which first appeared in 1681, is a valuable, but unfortunately too brief, a treatise on the prize law of that day. Even after the legislative union of the kingdoms, the prize jurisdiction still continued to be exercised in Scotland, down to the present century, chiefly with regard to captures made in the North Sea and Baltic—the captured vessels being brought into the Frith of Forth. But early in the present century, it is believed, it was deemed expedient for government to issue an order for having such captures, as those alluded to, adjudicated in London; and by the Act 6 Geo. IV. cap. 120, §. 57, commonly called the Scotch judicature act, the prize jurisdiction was regularly transferred from the Scotch courts to the English prize courts, thereby formally constituted the prize courts of Great Britain. And this measure of judicial centralization, it is believed, was fully justified by reasons of state policy.

CHAPTER I.

DESCRIPTIONS, DIVISIONS, SOURCES, OF MARITIME INTERNATIONAL LAW.

IN our late inquiries in international law generally, we endeavoured to simplify and reduce the number of the different descriptions of the *Jus Gentium inter Civitates*, specified by Grotius and his followers; and we found the whole admitted of a grand division into two primary kinds: the natural or necessary law of nations; and the positive law of nations. First, the natural or necessary law of nations, resulting from the constitution of mankind, as congregated into civil societies, and as composed of families living under one government, and occupying a portion of the surface of this earth as their territory. And here we found it unnecessary to subjoin, what Baron von Ompteda called the modified natural law of nations; because civilization appears to be as natural to man, as rudeness or barbarism; and because the juridical relations and legal rules of action, which apply to nations in a rude state, become extended and enlarged, or rather in a manner grow and unfold themselves, in proportion to the advancement of nations in civilization, and their increased intercourse, commercial and other-

wise. Secondly, the positive law of nations, or *Jus voluntarium*, resulting from the acts of men, direct or indirect; from the recognition, adoption and enforcement, by nations, of certain rules of conduct, as usages in their reciprocal intercourse; or from their coming under pactions or agreements to observe certain rules of conduct in relation to each other. And this second branch of the grand division may, therefore, be distinguished into two subordinate descriptions of international law: the *Jus Gentium inter Civitates Commune et Consuetudinarium*, the common and consuetudinary law of nations; and the *Jus Gentium Pactitium*, or conventional law of nations.

Originally, and prior to treaties becoming frequent among nations, the first branch of the grand division, the natural law of nations, formed the groundwork of the largest portion of positive international law. It consists, and is the aggregate of those legal or juridical relations among independent states, which admit of being enforced; or which may be enforced consistently with justice, reciprocity, and general expediency, as unfolded in the production of so many rights and corresponding obligations. These legal relations obviously exist, independently of the will of man; and like other relations, they are perceived, some almost intuitively, others after continued investigation, and a process of reasoning or induction from observation. And although the rules may be difficult of ascertainment, they appear to be all more easy of perception and recognition, than of adoption, establishment and enforcement.

The acts, or series or classes of acts, to which we have here referred, beside susceptibility of enforcement, are all of such a nature as to imply or involve a legal compulsory obligation to perform them, or to abstain from their performance. And the chief compulsory rules of law, applicable alike to individuals and to nations, have

been briefly described; *neminem lædere*; *Suum cuique tribuere*, *Pacta sunt servanda*; *Bono et æquo non convenit*, aut *lucrari aliquem cum damno alterius* aut *damnum sentire per alterius lucrum*.—But besides these acts there are a variety of matters in the detailed intercourse of nations, which are comparatively of an indifferent nature, and in which the proceeding may be fixed in one way or another, provided it be actually fixed and promulgated, so that it may be known before the time of action arrives. And, in addition to the legal rules, rights and obligations, before mentioned, which properly constitute the natural law of nations, but which require to be recognized and adopted by the positive law, to enforce their observance, the class of indifferent actions last alluded to, form also a considerable portion, both of the common consuetudinary, and conventional law of nations.

Farther, a number of proceedings among nations with reference to each other, which may not properly fall under the natural law of nations, or the maxims before enumerated, may be brought under that law by virtue of the broad principle of reciprocity,—of legal compulsory reciprocity,—not voluntary or optional reciprocity, as in the adjustment of the tariffs of duties on imports and exports, in which matter each nation is at liberty to do as it pleases. And to this undoubted principle of legal reciprocity, more weight perhaps ought to be attached, than is usually done in the intercourse of states. *Quod tibi fieri non vis, alteri ne feceris*. Thus, a nation whose government in the exercise of its unquestionable right of internal legislation, establishes regulations for its own subjects, in matters of Maritime prize, which consequentially affect the inhabitants of other countries, cannot, of course, pretend to have a right thus indirectly to dictate as a sovereign to other nations. But, if a nation has

thus established and adhered to a system of Maritime international law in relation to other states, affecting the interests of, and submitted to by the inhabitants of these other states, that nation appears to be clearly bound upon the principle of reciprocity, to administer prize law, with reference to the subjects of these other states, according to the same rules which it claims for itself and its own subjects. For in such circumstances, reciprocity is not merely an ethical or moral maxim, but a legal or juridical rule capable of enforcement, such as to justify a combination of nations to effect its observance.

So much for the natural law of nations, as arising from the juridical relations of independent states occupying portions of the surface of this earth as territories. In the progress of time, it comes to be gradually, and to a considerable extent at least, recognized and enforced by mankind in the shape of positive law. And we therefore proceed to the subordinate division of the second member of the grand division, namely, of the positive law of nations into common, or consuetudinary and conventional. And here we must enter into a somewhat fuller detail, in order to ascertain what foundation there may be for a new, and rather mysterious doctrine, of which great use appears now to be made in the Maritime department of international law. In our inquiries in international law generally, published in 1842, we took occasion to observe, that different German writers, and particularly Martens and Klüber, had, in framing or constructing the science, which they have denominated "*Droit des gens moderne de l'Europe*," ascribed a great deal too much to express conventions or treaties, as sources of that law; and we quoted M. Schmalz, and the author of the *Traité Complet de Diplomatie*, as so far correcting that error. In examining, however, more minutely the works of the writers in the Maritime department of international law, since

about the middle of last century, we find this mode of interpreting treaties resorted to, as an instrument for not only altering long established maxims founded on experience, but even for converting these maxims into nearly opposite rules. We find it almost maintained, that a nation may be compelled by neutral arms to enter into a treaty; and that, at all events, a convention concluded, or acceded to, by a majority of nations, must be held binding on the minority; especially if the latter had previously concluded treaties with other particular nations, of similar import, though for special considerations; in other words, that the general successive adoption of a treaty of a particular import, may come in time to render that treaty binding as a general law upon other nations, who have refused to accede to it, and who have never given any consent to the rule thereby established, beyond having made it, on certain occasions, a part of a special bargain with a particular people. Whether such a feat can be achieved, even by the most skilful diplomatic address, is an important question. And before proceeding to our historical details, it may be proper to investigate at somewhat greater length, the foundation of the common and consuetudinary, and of the conventional Maritime law of nations, as distinct from each other.

With regard to the common and consuetudinary positive law of nations, as already observed, the rules of justice, and legal reciprocity, which, it is individually, and generally, or universally, expedient to enforce by human sanction, exist in the constitution of mankind, and in the limited circumstances in which they are placed, independently of human legislation or enactment. These rules and juridical relations are to be discovered by observation, and ascertained by experience. When so discovered and ascertained, they are collected and

combined into a whole, and classified according to the qualities common to them individually. The discovery at first is only partial and limited; but it is gradually enlarged and extended. The adoption in practice is, perhaps, still more limited at first; but it also is gradually extended. So far as these rules are recognised and adopted in practice, they become positive human law. But beside the rules just alluded to, as requiring enforcement from the physical constitution of mankind, and their relative position and situation on this globe, many human actions and courses of action are indifferent in their nature or consequences, and only require to be regulated and fixed. These, too, come in the progress of time, to be gradually fixed, according to the extent of information then possessed;—and thus the common or consuetudinary positive law of nations appears to have originated, to have gradually grown up, and to have advanced to a comparative state of maturity; bearing an analogy to the conventional law of nations, somewhat similar to that which the common or unwritten consuetudinary law, or internal jurisprudence of a people, bears to its statute law, enacted by its legislature or sovereign power.

Let us now examine what conventional international law really is. The first marine treaties we find in history, are agreements not to plunder or injure the subjects of either of the contracting states, individually, at sea, during peace. The next treaties we find, seem to have had for their object, to confirm and insure the observance of rules of justice and reciprocity, previously admitted and recognized;—as statutes have been frequently passed by the legislature, in confirmation of the internal common law of a country. The object of the next description of treaties appears to have been, to obtain alterations and relaxations or restrictions of rules previously estab-

lished; in which the contracting parties appear to have been usually influenced, by views of particular interests at the time.

All such treaties, of course, have been, and are binding on the contracting parties.—But how long do these treaties endure? Does non-compliance with its terms, or other injury, absolve from, and extinguish, the whole stipulations of a treaty? How do such treaties afford proof of general usage? They, no doubt, show the habit of contracting, or bargaining, on particular points, and in particular ways. But they do not prove any consent to act on such particular points in such particular ways, beyond the extent and duration of the contract. Such consent cannot be inferred or presumed, from the special contract, beyond the terms, and independently of that contract, so as to be binding on the parties, and still less upon other and third parties, in all time coming. It seems vain to attempt to construct a general system of the law of nations, upon what are usually made matters of stipulation in such treaties. These treaties are a fit subject for the study of the diplomatist, and draughtsmen of treaties, so as to enable them to include all usual and necessary articles in the treaties they may be preparing; as a book of styles is of use to the conveyancer, in framing deeds, disposing of lands and heritage. But no one ever supposed such styles should become an obligatory part of the law of the land, or that the ordinary stipulations and convenient clauses of these styles, however frequently inserted, should become binding on parties who have not signed deeds containing them. Treaties prove the frequent adoption of particular stipulations and clauses, by particular parties; but they do not prove the consent of such parties to such clauses, independently of paction. If the rule stipulated had

been previously deemed binding at common law, there would have been no occasion for the special agreement.

Writers in favour of unlimited neutral trade, endeavour to engraft what they call a law of nations, upon such treaties. But this is a manifest departure from legal principle, and an unwarranted induction. A rule may have been originally introduced by such stipulation ; and by subsequent imitation and adoption, without special stipulation, (when not inconsistent with fundamental principle), have become a rule of common and consuetudinary international law. But the frequent repetition of the special agreement can have no effect upon the rights or legal condition of those who have not been parties to that agreement, and the occasional, or even frequent adoption of a special stipulation, in common with one or more other states, can never give these other contracting parties, and still less other parties generally, a right to compel the first party to comply with that stipulation, after the lapse of the period, or other dissolution of that contract, or independently of that contract.

So great, in the lapse of ages, has become the accumulation of treaties, in number and bulk, as to embrace the greatest part of the rules of international law. Leibnitz therefore wisely advised, and the Dutch, Germans, English, and other nations, have amply followed his advice, in not only making chronological collections of these treaties to a prodigious extent, but in arranging the subjects of these treaties, scientifically and alphabetically, so as to render them of more easy access. The services of Rymer, Dumont, Barbeyrac, Moser, Rousset, Wenck, and Martens, are, in this respect, very valuable; and it is to be desired the *Cours Diplomatique* of Martens were brought down from the peace of Amiens to the present time.

So far all is correct.—The aggregate of these treaties, so collected, constitute, so far as they are still in force, what is strictly and properly called the conventional law of the European nations. And from the titles of their works, one would conclude, that such was the legitimate view intended to be taken by the Abbe de Mably in his *Droit Public de l'Europe, fondé sur les Traités*, and by M. Bouchaud, in his *Theorie des Traités de commerce entre les nations*. But great looseness and vagueness in the conception of the idea of conventional international law, appear to have prevailed among jurists; and it is therefore necessary to endeavour by discrimination to form a clear and precise notion of what is understood by these terms.

To show that a rule or claim of right is a part of the conventional law of Europe, properly so called, it is, no doubt, sufficient to point out its insertion or recognition in one or more of the treaties before alluded to. Not satisfied, however, with this, some writers on international law appear to think, that to establish a rule or claim of right, as a part not only of the conventional, but of the natural, or at least common consuetudinary positive law of nations, they have only to point out its insertion or recognition, in two or three treaties, without enquiring whether, and apparently even although, these treaties may have been dissolved by subsequent hostilities, and never renewed. But such loose inferential, or rather conjectural argument from the particular treaty or treaties, to the common consuetudinary positive law of nations, founded on the customs and usages for centuries, on the general and uniform habits of action of nations, as indicating and placing beyond doubt their admission, recognition and adoption of the rules in practice, is in reason quite inadmissible. All that can be made of treaties, except in so far as they may assist in affording

evidence of habits of action, and deliberate recognition and adoption in perpetuity, among civilized nations generally, is to found the conventional law of nations, strictly so called, as before explained. So far as treaties go in mutual stipulations, so long as they continue valid, they are clearly binding on the two or more nations who originally entered into them, or have subsequently acceded to them. But beyond this they do not go. And Martens himself admits, in what a dubious and uncertain state many of the more important treaties among the European nations now are, in point of continued existence and obligatory force; from want of an express renewal, after intervening hostilities, or of repeated confirmation from time to time; from partial, or nearly total deviation, and indirect or implied revocation; from supervening breach of treaty on the one side, and other such causes.

Indeed many of the writers on Maritime international law, since the middle of the 18th century, although they would apparently wish to rear up, out of treaties, a law of nations, beyond, superior to, and more extensive than any such conventions, are forced to admit, that, except in so far as they may afford evidence of usage and consuetude, of continued habits of action, treaties are quite inadequate for such a purpose. They are forced to admit the truth of the doctrine of Bynkershoek, *Quaest. Jur. Publ. Lib. I. cap. x. p. 77. Jus Gentium Commune in hanc rem non aliunde licet discere, quam ex Ratione, et Usu. Ratio jubet, ut duobus invicem hostibus, sed mihi amicis, aequè amicus sim, et inde efficitur, ne in casu belli alterum alteri præferam. Usus intelligitur ex perpetua quodammodo paciscendi, edicendique consuetudine; pactis enim Principes sæpe id egerunt in casum belli, sæpe etiam Edictis contra quoscunque, flagrante jam bello. Dixi, ex perpetua quo-*

dammodo consuetudine, quia unum forte, alterumve pactum, quod a consuetudine recedit, Jus Gentium non mutat.

Thus, Hübner himself, the most energetic advocate of neutral claims, vol. II. part II. ch. I. p. 136—7. On ne sçaura nous contester, la particularité du Droit des Gens conventionnel. Ce Code secondaire des Etats Souverains est un Code Particulier; parce que, de l'aveu de tout le monde, ses maximes n'obligent, et ne peuvent obliger, que les Parties contractantes, en tant, qu'elles ne sont fondées, que sur les Traités, et à moins qu'elles ne soient des simples répétitions des Loix de l'Humanité. Il est constant, qu'il y a bien des Nations Souveraines, qui n'ont jamais fait des conventions ensemble, et qu'il n'y a aucun Traité qui leur soit commun à toutes. Ainsi, les engagemens de quelques peuples, ne pouvant pas servir, de règles, obligatoires de conduite aux autres, il est incontestable, que le Droit des Gens conventionnel, est un Droit des Gens Particulier. On s'aperçoit aisément, par ce qui a été dit, combien le Droit conventionnel diffère de celui qui est primitif et universel, en égard à leur étendue, aussi bien, qu'à leur durée. Celui là n'a proprement pour objet que les actions naturellement indifférentes, et il n'oblige que les peuples qui ont pris quelque engagement ensemble; Celui ci, au contraire, regarde toutes les Nations Souveraines du monde, connues, ou inconnues. Le premier se trouve resserré dans les bornes de la négociation; le dernier s'étend aussi loin, que l'idée de la Société Civile. Au reste, les Traités, qui composent le Droit des Gens conventionnel, ne sont obligatoires, que jusqu'à ce qu'ils soient enfreints, ou déclarés nuls, par les parties Contractantes; au lieu que les Oracles du Droit des Gens universel, sont toujours en vigueur. Qu'ils soient négligés, ou qu'ils ne le soient pas, ils n'en sont pas moins obligatoires, et leur autorité

ne cessera d'avoir son plein et entier effet, que quand les hommes cesseront de vivre en Société.

Thus also, Rayneval, *De la Liberté des mers*, Tom. I. p. 285, § II. Cependant je conviens que les faits peuvent établir un préjugé, et même ce qu' on nomme Droit Coutumier; mais pour qu' ils acquièrent ce dernier caractère, ils doivent être avoués de toutes les parties intéressées; hors de-là, ils n' imposent, que des obligations partielles, à l' instar des Traités, qui ne lient que ceux, qui les ont souscrits. p. 288. Les seuls Traités peuvent être cités, comme des exemples, parce qu' ils sont des actes publics du nombre de ceux, qui constituent le Droit des Gens conventionnel. * * * * Mais je ne puis cesser de le repeter, les traités, n' importe leur contenu, ne constituent point le droit des Gens; ils sont l' expression de la volonté particulière des contractans; et le droit des Gens est indépendant de cette volonté, ils ont la même nature que les contrats entre particuliers; mais à défaut de Contrat, c' est la loi commune, qui decide; et entre nations, la loi commune c' est le droit des gens.

CHAPTER II.

OF MARITIME INTERNATIONAL LAW—ITS SPHERE, MODE OF STUDY, AND COMPONENT PARTS GENERALLY.

FROM the cursory view which we lately took of international law, in the course of our inquiries in the science of law, it appears, that in tracing the history of Maritime and Commercial international law, as now proposed, we shall embrace only a small, but an important department of the general science.

It does not seem necessary in the history of this department, to develope or illustrate at greater length than we formerly did, the first grand division of the general and permanent legal or juridical relations of independent states to each other—namely, the legal attributes of sovereignty and freedom from foreign control, of equality in point of legal right, and precedence and rank from consuetude and convention; and of national conservation, comprehending the negative right of defence and security against aggression, and the positive right to maintain and promote the national welfare, consistently with the similar reciprocal rights of other nations. These general and permanent rights exist in all localities, whether on land or at sea; and in all states, whether of peace or war.

As little does it seem necessary here, to discuss at greater length than we formerly did, the second grand division of international law—namely, the occasional particular rights and obligations of independent states, so far as regards their intercourse in their collective or corporate capacity. The particular and occasional legal relations, which arise from, or occur in, the intercourse of independent states, in their collective or corporate capacity—namely, the rights of negotiation, chiefly by public ministers, and the right of proposing and concluding treaties of peace, or of offence and defence, or of general alliance, and of thereby binding other nations, are not peculiar to the Maritime department, but all belong to the science generally.

In the Maritime department, of course, the general and permanent legal attributes and relations, and general juridical principles just referred to, are not only applicable, but exercise a controlling influence in all states or conditions. And the particular and occasional legal relations of nations, as exhibited in their intercourse in their collective or corporate capacity, and the juridical principles thence resulting, or therein involved, are applicable, and take effect in bringing about the ordinary or extraordinary states of peace or war.

But, in the Maritime department, the chief object is the intercourse of nations in their individual capacity,—the intercourse by sea, of the individual citizens or subjects of independent states, as such, generally; or in the exchange, the purchase, or sale of the commodities produced in, exported from, or imported into their respective countries; in other words, in their commercial transactions. And accordingly, in investigating the history of Maritime international law, we shall confine our view very much to the aggregate of the rules which regulate such individual intercourse. If, on this occasion, we aimed at

the compilation of a digest of even that department only of international law, usually designated the Maritime law of nations, we should deem it incumbent on us to endeavour to arrange systematically, according to the order suggested in our inquiries on international law, or some better plan, the constituent parts of that branch, as forming a whole, and to trace its history from its rude beginnings to its present comparatively advanced state of improvement. But, as formerly observed, we do not now aim at the accomplishment of any such magnum opus. The greater part of these researches, after we form a tolerably accurate notion of the whole to be contemplated, will consist of historical narrative; of extracts from the early records of Maritime international law, which have been transmitted to the present times; and of analytical accounts or reviews of the successive works of the more eminent Maritime international jurists, accompanied with critical remarks. The result should exhibit the true state of the different legal doctrines, as actually recognized in successive ages, and of the grounds on which they rest, or were adopted.

In forming a general notion of the chief component parts of Maritime international law, under the limitations before mentioned, the leading object is, manifestly, the sea—not so much with reference to its produce and susceptibility of appropriation, or at least of subjection to the dominion of the adjacent countries, which matters belong, in a great measure, to the internal public, or constitutional law of states, as with reference to its use, as the grand medium of communication among nations. In both these points of view, there is a manifest distinction between the oceans, the high seas, the wide and open sea, on the one hand; and on the other hand, first, those narrow seas which are either wholly, or to a great extent, surrounded and inclosed by territories belonging

to one, or to more nations in common, which are either actually inland, or land-locked; and, secondly, that portion of the sea which is contiguous, or so nearly adjacent to the shores of continental, or insular territories, as to be capable of protection, and in a manner of appropriation by the nations to whom these territories belong. With regard to the former seas—the vast Atlantic, Indian, and Pacific or Australian oceans, are now recognized as free to all independent nations; certain pretensions being made by some nations, to the Maritime ceremonial in these seas. With regard to the other descriptions of seas which are land-locked, a certain empire or dominion, and even a species of appropriation is claimed over them, by the nations occupying the surrounding or adjacent territories, and is generally recognized to the extent of the exercise of an exclusive right of fishing, of entrance, sojourn, and transit, and of levying certain customary duties for the permission of passage or navigation. And with regard to those parts of the oceans or open seas, which stretch along, and are immediately adjacent to the coasts or territories, continental or insular, of different nations, it is manifest that a certain portion in breadth of the adjacent sea is, in a great measure, necessary for the national defence and security, is within the reach of cannon-shot, capable of being protected and commanded by artillery from the land, and is thus susceptible of exclusive and permanent dominion, if not of appropriation. Such immediately adjacent portions of the sea, too, cannot be used by nations generally, without diminishing the use or enjoyment of others,—and its produce is by no means inexhaustible. Accordingly, the sea is not held to become common to nations, till beyond the reach of artillery from the shore: and within that range, each nation is allowed to have a right of sovereignty, legisla-

tive, judicial, and executive, under the title of *Jus Littoris*, or Maritime territorial jurisdiction.

But the grand use of the sea in international law, is as a medium of communication for the conveyance of individual persons, having intercourse merely as such, or for the conveyance of persons and commodities; in other words, for the purposes of navigation and commerce.

With regard to persons considered merely as individuals, although each nation has a right to exclude all foreigners from landing upon its territory, except perhaps in the case of distress from shipwreck, the practice of all civilized, and particularly of all the modern European nations, is to admit at their sea-ports, all foreigners or strangers, under the condition of obedience, in all respects, to the laws of the country, and of being subject to the preventive police, as well as to the civil and criminal tribunals. And when once so admitted, foreigners become entitled to the benefit of the administration of these laws, both civil and criminal, provided they conduct themselves inoffensively, either to the government of the state, or to the individuals of whom it is composed. Such foreigners also receive the benefit of the laws of their own country, so far as these laws are in conformity with, or are recognized, or given effect to, by the laws and judicial establishments of the country into which such strangers have come, for the purpose of residence. And this arrangement has been frequently described as, and denominated a branch of international law. But this appellation is erroneous. For it does not involve any international question of right, such as can be enforced by nation against nation, and arises entirely *ex Comitatu Gentium*; no nation being entitled to compel another nation to adopt or recognize its laws, contrary to the will of that other.

But the chief Maritime communication or intercourse

among independent states, is for the exchange of commodities, and the general purposes of commerce. And agreeably to the practice of civilized nations generally, and of the European nations in particular, while ships of war are, of course, excluded, except by special arrangement, all foreign merchant vessels are admitted into the ports, harbours, and road-steads, subject to such regulations, restrictions, and customary duties, on the importation or exportation of commodities, as the government of the country may have thought fit to impose. When foreign merchants, or sea-faring people with their commodities, have been thus admitted into the sea-ports of a nation, they are entitled to the same protection from the laws and tribunals of the country, with reference to their persons, property, and dealings, as the native inhabitants. And, in this way, such foreigners really enjoy, in a great measure, the benefit of the laws of their own country. For among all civilized nations, the laws of Maritime commerce, as enforced by their respective internal tribunals, are very similar, and of a common and general nature, such as to be almost uniformly adopted.

In considering, in a separate work, the private law of Maritime commerce, which, though common, and very similar among most civilized states, forms a part of the private internal law of each state or jurisprudence, we found that its principal doctrines might be arranged under the following heads. In the first place, property in vessels, as the instruments by which Maritime commerce is carried on; the right and duties of the persons by whom the vessel is put in motion, or navigated; the rights and obligations of the persons by whom the vessel is converted to use, under the contracts of affreightment and charter party; and the rights and obligations arising out of the arrangements by which the Maritime exchange

of commodities is effected. In the second place, those contracts and arrangements among individuals, by which Maritime commerce is rendered more safe for the individual, by the diffusion of the risk under the contract of insurance; by which it is enlarged or extended, under the contract of copartnership; and by which it is facilitated, through bills of exchange.

In the amicable intercourse of nations, all and each of these different transactions take place between the citizens or subjects of separate independent states. Where compulsion is necessary, the properties of these foreign traders are protected, and their contracts or agreements are enforced, either for or against them, by the courts of law of the country, where the foreigners or natives are resident, or where the effects are situated, or transactions have been entered into. And from the similarity of the internal private law of Maritime commerce in all countries, pretty nearly the same justice is obtained by foreigners, as if the litigation had taken place in their own country; the claimant having, of course, to prosecute the opposing or resisting party, in the place of his domicile; and the deed or written document, instructing the contract or undertaking, being held valid, if prepared or executed according to the law of the country where the contract was entered into, or the transaction took place.

In this amicable and pacific intercourse, questions as to property in vessels—disputes between the owner, part owner, masters, and crew, or persons employed in the navigation of the vessel—questions between the owner or master of the vessel, and the charterer or freighter of the vessel, or owner of the cargo shipped for conveyance—the reciprocal rights of the merchants who order or purchase, or who sell, or consign for sale, the goods shipped and conveyed—the reciprocal rights and obliga-

tions of copartners, of the insurers and insured, and of the parties to bills of exchange, drawn or granted for the value of the goods conveyed, are all judged of and settled, although between parties who stand in the relation of foreigners to each other, according to very similar principles and rules, by the judicial tribunals of their respective nations. And in such questions of private right, between the individuals of separate independent states, the judgments of the courts of law of civilized states, have, in peace, in general, been satisfactory, notwithstanding national bias; and have not required, or, at least, have not led to the establishment of regular international courts, for the decision, during peace, of such questions between the members of different nations.

But such amicable and peaceful intercourse—such administration of justice to individuals of different nations, in matters of private maritime and commercial right, by the judicial establishments of either nation, is, unhappily, not among the permanent relations of nations; and is liable to be disturbed and interrupted by defensive and just war, and frequently also by the aggressive and unjust wars of governments. In a state of warfare, all such amicable intercourse and exchange of commodities cease. From the commencement of the war, all intercourse becomes illegal between the individual members of the hostile or belligerent nations. The property and effects of the enemy become objects of lawful seizure, under the sanction of the belligerent governments. No individual of the foreign belligerent nation, can enforce his contracts, or otherwise obtain justice, through the judicial tribunals of the opposed belligerent. Any individual merchant of one belligerent nation, transmitting goods by sea to an individual of the opposed belligerent, incurs a forfeiture of these goods. All such mercantile contracts, if not absolutely annulled by the war, so as

never to revive, are at least suspended. And the only contracts or treaties binding on the belligerent nations during the war, appear to be conventional arrangements for the exchange of prisoners, for the suspension of hostilities, and other such measures, relative to the mode of carrying on the operations of the war.

But the effects of war are not confined to the belligerent nations; they extend to neutral nations, not engaged in the war. The latter are, no doubt, entitled to carry on their accustomed traffic during the war, with either belligerent, as well as with other nations. But they are bound to act with complete impartiality; and not for their own profit, and increase of their own trade, to lend assistance, though indirect, to the one belligerent against the other. The restrictions to which the Maritime commerce of neutrals is liable, may arise from the nature of the goods conveyed, from the mode of conveyance, and from the situation of the ports or places to which the goods are destined. They may be held not entitled to supply either belligerent with military stores, called contraband of war, or to trade with the ports of the one belligerent, which are blockaded by the other, or to carry on the coasting trade of either belligerent, or to trade between the one belligerent country and its colonies, during war, when they have been previously excluded from such trade during peace, or to protect by their merchant vessels, in the open sea, the goods of the one belligerent from capture by the other.

With reference to such restrictions, and the questions and disputes thence arising, as amicable relations are still maintained between the belligerent and neutral nations, there is room for, and there have accordingly come to be established, international tribunals, which, proceeding on the principles of international law, judicially determine such questions between belligerents and neutrals,

and also decide such questions as arise between or among the subjects of either of the belligerent states, from captures and recaptures. By such international tribunals, not only are the express provisions of treaties, or the conventional law of nations enforced, but those principles of natural coercive law applicable to states, whether in a rude or civilized condition, and independently of conventions, or other acts of men, are evolved and elucidated from observation and experience, and are ascertained and defined as having been confirmed by long, and, if not universal, very general usage. And it is in this way, that what may be termed the common or consuetudinary Maritime international law, as distinct from the mere conventional, comes to be gradually formed, and to constitute the better part of general Maritime international law; in the same way as the common internal law of a state, composed of a series of judicial determinations, is frequently superior to the mere statutory law, consisting of particular enactments, brought forward upon particular occasions, and to meet particular emergencies.

CHAPTER III.

OF MARITIME INTERNATIONAL LAW IN ANCIENT TIMES. .

HAVING thus endeavoured to form a pretty distinct notion of the sphere or range, and chief constituent parts or branches of Maritime international law, we proceed to trace its history in ancient times, from such documents as may have been discovered to exist.

The records of antiquity which have reached us, afford no evidence of the cultivation of the Maritime law of nations as a science. With regard to the ancient nations, who first distinguished themselves by their success in Maritime commerce, such as the Phœnicians or Tyrians, we have no account even of the international usages of these early navigators. But in those early ages, when the law of the strongest was almost the only rule of human action, the ancient historians, such as Herodotus, Thuoydides, Diodorus, Siculus, Justin, inform us, the plunder of vessels at sea was considered as a kind of war, avowed by the nation, if not expressly authorized by the sovereign; and was the ordinary practice of Maritime communities or states. In proportion, however, as civilization made some progress, and as the necessity of mutually protecting each other came to be

strongly felt, not only by citizens or subjects of one and the same state, but also by the states themselves respectively, in relation to each other, the general piracy of people against people, gave place to regular wars. The individuals who carried on the trade of pirates, came to be considered as common enemies. And we learn from historians, that the nations who had obtained what was called the empire or dominion of the sea, directed their exertions, and frequently united their efforts, to put an end to such piratical depredations. Indeed it is only by taking into view the gradual civilization of different nations, that we can form any reasonable conjecture with regard to their practice relative to shipwrecked goods. While semi-barbarous tribes were engaged in constant warfare, there could exist little inducement to afford protection to the individuals who had suffered shipwreck. It appeared natural enough to seize in any way, whatever was thrown on shore by the tempest; when people believed they had a right to go to sea, and attack and plunder the same individuals. But, after piracy had ceased to be, the habitual practice of nations against each other, after the necessity and advantage of reciprocal protection, assistance, and regard had been felt, and each state no longer shut its territory against foreigners, it is not to be presumed, that those whom the tempest had thrown upon their coasts, with the sad fragments of their fortunes, would be less favourably treated than those who landed voluntarily for the purpose of trading for their own emolument.*

GREEKS.

Although they were accustomed to consider all other nations as barbarians, the Greeks constituted among themselves a number of small separate independent

* Pardessus, *Collect. de Lois Maritimes*. Tom. I. p. 33—34.

communities, connected by one common origin and language. This was a state of matters favourable for the growth of international law. And they accordingly seem to have made some progress, in at least the practical recognition of some of its principles. One great object of these small states was, the extension of their trade by navigation. In their Maritime intercourse and exchange of commodities, they found, from experience, certain modes of proceeding more just and more convenient, reciprocally, than others. And certain usages and customs came thus to be adopted. In time, these different independent states seem also to have perceived the advantage of extending and securing their Maritime commerce, by special conventions and treaties with each other. But it was not till after these usages and treaties had been found defective or inconvenient,—not till after mistakes had been discovered, and disputes had thence arisen, that there was felt any strong inducement to think of ascertaining and establishing what was just and generally expedient, among such separate independent states, as positive international law. And, accordingly, it does not appear the Greeks ever moulded the rules thus practically recognized, into the shape of a science.

Some laws of which the texts are vaguely and obscurely recited, have given rise to an opinion, that among the Greeks, the fisc, or public treasury, appropriated the goods which had been thrown on shore, in consequence of a shipwreck. But these laws, so far as they have had any real existence, and so far as the citations of them are not the mere imaginative inventions of authors, taken from the common-places of orators, do not appear to have the meaning which has been ascribed to them. There is nothing in them that excludes those who have experienced shipwreck, from the right of collecting and resuming possession of their effects. And it is probable

these laws were limited to the cases in which, from the shipwrecked goods having remained unclaimed by any owners, it was natural enough to establish the preference of the fisc or state, over the individuals who might find and collect the goods on the sea shore.*

We have very little information what was the international law of the Greeks, concerning the right of Maritime captures by national ships of war, or by privateers. We know only, that such a right was held to exist; that commerce with the enemy was interdicted; that the vessels and the merchandise of the enemy were confiscated; and that often their persons were exposed to barbarous treatment, which provoked dreadful reprisals.† And a passage of Demosthenes gives reason to conjecture, that, in the cases of recapture from the enemy, or from pirates, the Greeks followed, in the recovery by the owner of the property of which he had been deprived, rules similar to those which regulate modern nations.‡

Although comparatively late in devoting themselves to navigation, the Egyptians appear to have granted to foreigners, whom commerce attracted to their country, the right and power of having judges of their own nation and choice, to regulate and decide according to their own laws, the disputes which arose among them; and the Greeks appear to have specially, if not exclusively, enjoyed this privilege.§

The only authentic remains of the Rhodian laws, which have reached modern times, are, as we have seen in tracing the history of private Maritime law, what we have received through the medium of the Roman juris-

* Pardessus Coll. de Lois Marit. Tom. I. p. 48—49. † See Pardessus Coll. de Lois Marit. Tom. I. p. 49, and the Greek authors there quoted. ‡ Demosthenes de Halones. T. I. p. 77. Reiske. § Pardessus Coll. de Lois Marit. T. I. p. 52, Herodotus Lib. II. § 178.

consulta, and these do not contain any regulations properly international.

CARTHAGINIANS.

Carthage is said to have been the first trading state which conquered countries, in order to render its commerce with them more extensive and secure. In those countries where she could not by any means avert the competition of a powerful rival, Carthage limited her policy to the acquisition of the next place in power. In point of naval superiority, the Carthaginians do not appear to have ever made any claim to the dominion of the eastern part of the Mediterranean; whether they were afraid of the Greeks, or probably were averse to obstruct, or interfere with, the markets of their Phœnician brethren. But they succeeded in engrossing, for a long time, the whole trade of the western part of that inland sea. How active the trade was between Carthage and the Italian states, is shown by the numerous commercial treaties which were concluded between them. Of these treaties several have been preserved, and were published by Barbeyvac in 1739, in his *Recueil Historique des Anciens Traités*, and were learnedly commented on in 1780, by Professor Heyne. The greater part of those treaties, however, referred only to the restriction of the depredations at sea, which the Romans and Etruscans, as well as the Carthaginians, then carried on to a great extent. In these commercial treaties, the Romans expressly engaged not to allow any captures or plundering of vessels on their part, on the coasts of Africa; and the Carthaginians, not to allow any depredations on their part, on the Roman-Latin coasts; but with this express declaration, that it should be lawful for them to plunder the vessels of those states which were merely in alliance with, not subject to, the dominion of the

Romans; and to make slaves of the inhabitants of those states, provided they should not be exposed to sale in Roman ports. Nay, if we are to believe the Roman writers, Carthage carried her commercial jealousy so far, as to interdict the nations who contested with her the supremacy at sea, from landing on the coasts under her dominion;—these writers even allege that she sunk all the vessels, with which her own met, directing their course towards Sardinia, and towards the strait which now bears the name of Gibraltar.* But it is with distrust we must receive such sort of accusations made by writers, naturally led to exaggerate whatever could render odious, a rival so long formidable to the Romans. Maritime commerce necessarily implies amicable relations among nations; and Carthage could not have rendered herself so powerful, by means of that commerce, if she had usually been in such a state of hostility with all the surrounding nations.†

The Maritime laws of the Phœnicians and Carthaginians have not reached us. As the former had ceased to be distinguished as a great trading state, at the period when Rome began to have historians; and as, on the other hand, it was a maxim of that republic, not to believe herself in safety, as long as the name and walls of Carthage existed, the conclusion is, that she neither deigned nor wished to preserve the Maritime legislation of these nations. Nay, it is not improbable, that more occupied with inflicting injuries upon their enemies, than studying their institutions and their laws, the Romans may, in fact, have had no knowledge of those which Carthage had received from her founders, or had framed from her own experience.

* Strab. Lib. XVII. cap. I. § 9. † Pardessus Coll. de Lois Marit. Tom. I. p. 19, 20.

ROMANS.

Among a people so ambitious as the Romans of conquest and universal empire, we are not to look for any great respect or regard for the rights of other independent nations. The *Jus Faciale* disappeared amidst the intestine civil wars, *Nullos habitura triumphos*. And, when the empire became so large, as to embrace all the countries which surround the Mediterranean, their great *jurisconsults* had sufficient occupation in determining the principles, according to which should be decided the numerous questions and disputes among the various classes of the inhabitants of Italy, and of the vast provinces; and do not appear to have had any inducement or leisure to discuss what might be the legal rights of the surrounding independent barbarous nations. Accordingly, in the large *Corpus Juris* of the Romans, we find only a few texts, involving questions, or establishing rules, of international Maritime law. Having adopted into their own law, rules borrowed from foreign legislation in Maritime affairs, the Romans could not fail to recognize some regulations relative to sea-wrecked vessels and cargoes. And to correct an erroneous opinion of their law in this respect, which seems to have been entertained by some writers, it may be necessary to distinguish with M. Pardessus, the two points of view in which the matter may be contemplated; first, with reference to shipwrecked goods, to which no one pretends any anterior right of property, and which in the legislation of France, are called *Epaves*; secondly, with reference to shipwrecked articles, susceptible of being reclaimed by the proprietors, whom the shipwreck has deprived of the possession, without any consequent loss of the property. In the first point of view, as by the Roman law, in its best and purest state, things abandoned, and without any owner, were held to belong to the first

occupant, it is probable that the advocates of the treasury may have often sought to appropriate to it, things of this description, and to abolish the acquisition thereof by individuals, by means of occupancy. And it is most probably to this new pretension, that Juvenal alludes, not as bearing testimony that the law sanctioned it, but in order to turn it into ridicule, and to render it disreputable in public opinion. In the second point of view, it does not appear, that the Roman law ever ascribed to the fisc, or treasury, the right of appropriating shipwrecked effects. If the most ancient text preserved in the digest, which recognizes the right of proprietors to reclaim things thrown over board in a shipwreck, or any other disaster, is that of Minucius, who lived in the reign of Trajan, there can be no doubt the rule sanctioned by that decision was observed in more ancient times, since Plautus alludes to it.* It was obviously in consequence of these ancient principles, reiterated by the jurisconsults, posterior to Minucius, and in order to secure their observance by a penal sanction, that a senatus consultum, in the reign of Claudius, punished severely those who seized goods cast on shore, in consequence of a shipwreck; and that another senatus consultum of uncertain date, specified the different wrongs which might be done to shipwrecked persons, and pronounced against the guilty the punishments of the Lex Cornelia de Sicario. A crowd of texts declare that what belongs to one person, cannot, without his consent, express or tacit, be transferred to another; that, as the intention of abandoning the property of what has been thrown overboard in a storm, cannot for a moment be supposed, these things always belong to the persons who last possessed them, and ought not to become the prey of the first occupant; that no one can

* Rudens Act W. Scen. 7.

acquire shipwrecked goods by prescription; and that he who takes possession of them, with the intention of keeping them as his own, commits a robbery or theft. Such a system of law plainly excludes the idea, that shipwrecked goods could be appropriated by the public treasury. Accordingly, Adrian again sanctioned by an edict, the right of shipwrecked persons to reclaim their goods against the proprietors of the lands, on the sea-coast, where they might be thrown on shore; and directed that those who participated in the pillage, should be punished. In short, the law, according to the expressions of the jurisconsult Callistratus, had adopted all the measures which were within its power, to prevent wrecked ships and their cargoes from being pillaged. The avarice and cupidity of the inhabitants of the sea-coasts, no doubt, occasioned the frequent renewal of the laws just referred to. And hence the Antonines issued a new penal edict, and declared in a rescript, that no one had a right to prevent a person who had suffered shipwreck, from collecting the fragments of his property. Attempts, however, may have been made from time to time, on the part of the treasury, to raise such pretensions; but Constantine rejected such attempts, and proclaimed the maxim, that the treasury ought not to be enriched by the misery and ruin of the citizens. Nothing exists to lead to the belief, that the successors of Constantine introduced other principles. The contrary is proved by the constitution of Honorius and Theodosius in 412. And the compilations of Justinian clearly recognize three different actions granted to persons who had suffered shipwreck, for the recovery of their effects.*

The Roman law reckoned plunder by pirates among cases of *Vis Major*, inevitable accident, which furnished to the owner, charterer, or master of a vessel, a legitimate

* Pardessus Coll. de Lois Marit. Tom. I. p. 76, 77, 78.

defence against the demand for the goods entrusted to their charge; and it placed among sacrifices made for the common safety, the sums or value given for the ransom of the vessel, which pirates had captured. The law considered the pirate less as an enemy, than as a robber, who could not acquire by any lapse of time whatever, the property of what he had seized, nor transmit it legitimately. And Cicero, who in his admirable treatise *De Officiis*, teaches so eloquently, that it is not permitted to break one's promise even to an enemy, whatever personal danger may be incurred in the performance, declares expressly, that this rule ought not to be extended to promises made to pirates.*

The shores of the sea, which formed part of the empire, were considered as the property of the Roman people; and although the use of them was held to be common to all mankind, for fishing and navigation purposes, the authority of the *Prætor* was necessary to warrant the construction thereon of any buildings. But the want of such authority did not involve the destruction of such works, if not injurious to fishing or navigation, or the cause of damage to others. And the sole object of the authority required, seems to have been, to ascertain and establish the sovereignty of the Roman people, over the coasts which formed part of their territory.†

In establishing regulations for the shores of the sea, the Romans had generally in view, only the coasts of the Mediterranean. Their dominion over some of the coasts bordering upon the ocean, had commenced only at a late period of their history. The tribes which inhabited the more distant coasts, had, scarcely emerged from the savage state, or were at least semi-barbarous; and the formation of establishments among them, had

* *Lib. III. cap. 29.* † *C. Comte, Traité de le Propriété. Tom. I. p. 355, and Roman authorities there quoted.*

excited little interest. Navigation, too, was not so far advanced, as to enable sea-faring people to venture across the ocean, to carry on commerce, even with the sea-coasts of the countries, which, by the march of her armies, Rome had subjected to her empire.

Some writers have believed that the Roman law suggested the idea of such consuls as are now actually established by all commercial nations in foreign countries, to protect and attend to the interests of their subjects trading with these countries, and sometimes even to administer justice between them. But, in this opinion, we agree with M. Pardessus in thinking these writers are mistaken. A very superficial knowledge of the political principles of Rome, is sufficient to convince us her government would never have permitted foreign envoys to exercise any authority within the Roman territory, even over individuals of their own nation. It is true there existed at Rome, a Prætor, Peregrinus, charged with the administration of justice to strangers or foreigners. But, without having any occasion to examine what was the extent of the power of this Prætor, or what were the rules for the exercise of his jurisdiction, we know that he was chosen by the Roman citizens, and afterwards by the emperors. Thus this magistrate resembled neither the consuls, whom sovereigns now maintain in foreign countries, because these functionaries are nominated by the governments who send them, and are chosen from among their subjects; nor the mercantile consuls, who in many countries adjudicate commercial causes, because these judges have a special jurisdiction, by exception, for commercial affairs, whether they concern natives or strangers; whereas, the Roman Prætor, Peregrinus, adjudicated every kind of causes, between or among strangers or foreigners. He might rather be compared to the conservators who exist in some countries, and to whom is entrusted, exclusively

of the territorial judges, the right or power of judging strangers, according to their own laws, or the principles of the law of nations; but who are appointed by the sovereign of the place where they exercise their functions.*

So much for the chief fragments of the Maritime international law of the Roman republic and empire, down to the subversion of the latter in the west, by the invasions and settlement of the barbarous northern nations in the European provinces. In tracing the Maritime laws of the Greco-Roman or eastern empire, almost the only regulations we find of an international description, relate to shipwrecks. And from the Basilica, it appears that these rules, and the protection thereby afforded to persons who had suffered shipwreck, did not differ from the provisions in that respect, of the original, or proper Roman law; such persons being held to remain proprietors of what they had lost, on the sole condition of making fair remuneration, in name of salvage, to those who had rescued the fragments of the vessel or cargo from the sea. Nothing in the Basilica supports the belief that the treasury pretended any right to such articles.

That the practice, however, of pillaging shipwrecked persons, existed in the Greek or eastern empire, as it had previously done to a certain extent, generally, before the subversion of the empire in the west, may be inferred from a passage of Nicetas Choniates, relative to the efforts made by Andronicus Comnenes, to repress this barbarous custom.† It does not appear that these exertions were attended with success. Private interest and habits were stronger than the laws. And, whether the barbarous usage of the northern invading nations in this respect, extended to and encreased the evil in

* Pardessus Coll. de Lois Marit. Tom. I. p. 82. † Annal Lib. II. p. 209. Edit. by Fabrot.

the eastern empire, or the practice had been there adopted as a sort of reprisal, we find that in the 13th and 14th centuries, this practice of pillaging shipwrecked persons prevailed to a great extent in the eastern empire, since diplomas, charters, emanating from the sovereign, were necessary to exempt certain nations from such treatment.*

* See Capmany Mem. Hist. di Barcelona. Pardessus Coll. de Lois Marit. Tom. I. p. 177.

CHAPTER IV.

OF MARITIME INTERNATIONAL LAW DURING THE MIDDLE AGES, FROM THE 6TH TO THE 12TH, AND FROM THE 12TH TO THE 15TH CENTURY, INCLUSIVE.

SECTION I.

Of the Maritime intercourse of the northern nations, who conquered and settled in the Roman European provinces, for a series of ages after their invasion and settlement.

HAVING taken this cursory view of the very limited development of Maritime international law in ancient times, we proceed next to trace its history in Europe, after the subversion of the Roman empire in the west, namely, from the 6th to the 15th century, inclusive, or during what have been called the middle ages. And this period we may subdivide into the period from the 6th to the 11th century, inclusive, and the period from the 12th to the 15th century, inclusive. During the first of these shorter periods, the northern nations effected their settlement in the subjugated provinces of Rome; the invading tribes became amalgamated with the conquered population; the Saracen invaders from the south were repelled in the east and in the west of Europe; certain trading states arose on the northern coasts of the Mediterranean, and the comparatively splendid and

happy, but too short reigns of Charlemagne and Alfred, appeared as anticipations of the higher degree of civilization which the European nations were destined to attain. The second of these shorter periods commenced with the crusades, which lasted about two centuries, and which, whatever views may be entertained of the motives by which the western nations were actuated in these attempts to regain from the infidels possession of the Holy land, certainly brought the European princes, nobles, and commons, more in contact with each other, and promoted their commercial intercourse. In the course of this second period, also, the trading states of the Mediterranean rose to greater wealth and power, and towards its close, the final conquest of the Greco-Roman empire, and the capture of Constantinople by the Turks, had at least one good effect, that of accelerating the civilization of Europe, by forcing westward considerable numbers of comparatively cultivated individuals.

In the Maritime, as in all the other departments of international law, we had occasion to remark, in our general inquiries in that science, that while the principles exist, and are to be sought in the physical constitution of those assemblages of men called nations, and in the circumstances in which they are placed on this earth, or in the juridical relations of nations to each other, we have to trace the adoption of these rules, to a certain extent, the realization of them in the practice of nations, and the gradual development of the science, in the records of past ages which have been transmitted to us, and have been accordingly denominated the sources of international law. This gradual adoption, and realization, and conversion into positive law, of the principles of justice and reciprocity among nations, we had also formerly occasion to remark, is effected in two ways;

either from the consent of nations, as implied by, and to be inferred from, their long established customs and usages; or from their consent expressed *totidem verbis* in international treaties, binding on the contracting parties. And there are thus, besides the natural law of nations, two sources of positive international law. First, the collections or records of international long established usages, comprehending also the legislative regulations or sovereign ordinances, which each nation may establish internally for these matters, and the judicial determinations of the tribunals of each nation in such matters, as proving the practice of that nation in the administration of international law, and as at least constituting that law, against itself, on the recognized principle of reciprocity. Secondly, international conventions or treaties.

In surveying the two periods before-mentioned, we shall, of course, endeavour to derive information from both these sources. But, during these comparatively rude ages, the former of these sources is much the more important of the two, if not the sole source; treaties among nations being then comparatively infrequent. And, although in later and more civilized times, treaties have become much more frequent; to such an extent, indeed, as now to form the great body of the existing positive international law of modern Europe, as we may afterwards have occasion to observe, they constitute but an unstable basis for international law, inasmuch as they are of limited, not perpetual, and frequently of uncertain duration, besides being liable to various incidental events and causes, which justify, or afford a pretext for, their infringement.

The preceding remark as to the small number of international treaties in rude times, is peculiarly applicable to the period from the 6th to the 11th century, inclusive. In the subsequent period, from the 12th to

the 15th century, inclusive, treaties were more frequent; but still so few, that we shall include the reference to them, along with the notice of customs and usages, so far as they may afford evidence of the latter.

In reviewing the Maritime and commercial laws of the Romans, we found very few rules of a strictly international description. But the great body of that Maritime law was of a common and general nature, so as to be applicable in time of peace, between the inhabitants of different independent countries and states, as well as between the inhabitants of one and the same country or state. As thus so far constituting a body of Maritime international law during peace, the Maritime law of Rome continued, after the subversion of the empire in the west, to exercise considerable influence, not only in Italy, but also in the other countries bordering upon, and on the north side of, the Mediterranean. And accordingly, in our late Historical view of the private law of Maritime commerce, we had occasion to remark that, however destructive otherwise to commerce and manufactures, the invasion and settlement of the northern nations did not, for a time, in many particulars, materially affect the practice of Maritime law, either by abrogating old, or introducing new rules. To this observation, however, there is one material exception, and that in international, as well as in the internal law of states. We have just seen the solicitude of the Roman law, for the protection of persons suffering from shipwreck,—the result of civilization, and of the sentiments of humanity which it inspires, or in which it may be said so far to consist. The horrible practice, absurdly called the *Jus naufragii*, the right of pillaging shipwrecked persons, and of wresting from them what the tempest had spared, appears to have been re-introduced upon the occasion of, and in a great measure through, the in-

vasions by the northern nations, and through the anarchy and barbarism which these invasions brought in their train. And as the contemporary historians attest, the Roman law was, in this respect, forgotten, or rather wilfully neglected and disobeyed. From time to time, indeed, as M. Pardessus observes, when civilization threw some gleams of light across the dark abyss of barbarism, humanity made her voice be heard. Anianus had, in the collection compiled by the order of Alaric II. inserted the fragment from the *Sententiae Pauli*, which inflicted punishment on those who pillaged in the event of a shipwreck. The code of the Visigoths contained the same rules; and these were probably followed in some other countries. But it cannot be said, that in this respect, the Roman law retained or preserved its authority, as in other Maritime and commercial matters.

Farther, although by no means apparent at first sight, the mode in which the northern nations invaded, conquered, and settled in the European provinces of the Roman empire, and the military government which they were thus led to establish, supported by, and dependent on, the tenure of land for warlike services, had, it will be found on investigation, a material influence, not only on the internal public, or constitutional law of the different European states, and on their general international law and intercourse with each other, but also on their Maritime international law. Power was almost exclusively attached to, and dependent on, the possession of land. And, although the subordinate feudal chiefs did homage as vassals, to the highest military and civil chief or king of the nation, the former retained and exercised for ages, the attributes of sovereignty; and among these attributes they long claimed, and were allowed, the privilege of making private war.

Such a description of government could not fail to

strengthen what we have seen to be the disposition of barbarous nations inhabiting the sea-coasts, if not to sanction expressly, at least to allow to individuals the plunder of all vessels at sea. The subordinate feudal chiefs or vassals, whose less extensive territories were adjacent to the Mediterranean, the Atlantic, the North Sea, or the Baltic, claimed, along with their monarchs, the right of Maritime war. And hence the greater frequency and extent in modern Europe, of *Armemens en Course*, or privateering expeditions, which have continued even to this day, under certain limitations and restrictions.

Farther, while the Mediterranean was infested by the Saracens and other pirates, and the North Sea and Baltic were likewise infested by the Normans and other pirates, a merchant vessel could scarcely venture alone upon a long voyage, however well armed. Associations were therefore formed *de Conserve*, to sail in company for mutual protection; a chief was chosen, who in time, received the appellation of admiral; and an agreement was entered into to divide the booty which might be captured, in defending themselves against pirates or the enemy. Nor were these associations always confined to defensive operations. They were frequently entered into chiefly with the design of attacking pirates or the enemy, and of making prizes of their vessels, without taking the trouble of giving a legal form to such expeditions. And instead of restraining these private war-like enterprises, the sovereigns of the European states, for a long time, rather encouraged their subjects in such undertakings.

In time, however, experience showed, that as private wars among the citizens or subjects of the same nation, were incompatible with the tranquillity and welfare of the state, so the use of acts of force, directed in time

of peace against foreigners, at the free will or caprice of individuals, continually disturbed its quiet, and endangered its security. In proportion as governments began to acquire more strength, and to prohibit acts of violence among the subjects of one and the same state, these governments also began to restrain acts of violence directed against foreigners. And while during the periods we are contemplating, the subjects had hitherto only sought authority from the sovereign, when circumstances appeared to render such an application advisable, governments began in the 14th century to compel their subjects, previously to obtain from them permission for such expeditions, by means of letters of reprisal and marque.*

In time, too, it came to be more frequently agreed in treaties of truce and peace, that not only the reprisals hitherto exercised should cease, but also that in future, if the subjects of the one state should have complaints to make against the subjects of the other, those complaints should be first addressed to the sovereign of the other; and that reprisals should be exercised only in the case of a denial of justice by the latter, and then only in virtue of letters of marque and reprisal granted by the government.

It came also, in time, to be stipulated in treaties, by the European governments, that the effects of their respective subjects should not be attached in the territories of the other, for the debts of their fellow-countrymen; and that in general, such attachment should not take place, except on account of the debts or crimes of the proprietor, or at least in the case of a denial of justice duly established. And the consequence has been, to render the use of such letters of reprisal very rare in more recent times.

* Von Martens *Essai sur les armateurs, les Prises et Reprises*. Chap. L. § 4.

If it was of importance for better securing tranquillity in time of peace, to limit the use of reprisals, there were equally urgent reasons for prohibiting even in time of war, all private violence at sea, which was not preceded by authority from the sovereign.. This afforded the only means of exterminating the piracies so dangerous to all commercial nations, whether neutral or belligerent, and for which the pretext of a war could scarcely be wanting, in times in which Europe was seldom at peace. But it was not till towards the close of the two periods we are now contemplating, that the important object here alluded to was attained; and even then, not effectually accomplished.

SECTION II.

Of the Earliest Records of Maritime International usages.

IN our inquiries into the history of international law in general, we had occasion to remark, that the division of the Roman European provinces, among the different invading nations, into so many separate kingdoms, principalities or states, independent of each other, but of which the population were connected by various ties, and were led to frequent intercourse, from affinity of language, and from the adoption of the same religion, was favourable to the growth of international law; and gave rise in time to that system of positive international law, now known under the appellation of *Droit des Gens Moderne de l'Europe*. And we also remarked that the public were indebted to Mr. Ward, in his "History of the law of nations prior to the age of Grotius," for pointing out almost the only records of international law, which existed in the long interval between the sixth and the

fifteenth centuries, inclusive, and for supplying, in some measure, the want of contemporary writers, by explaining generally, the leading causes which promoted national intercourse in Europe, and consequently, the progress of international law; such as the occasional assemblage of sovereigns in one grand council, to protect a common interest; the custom by which territorial property and dominion were held to pass from one sovereign family and people to another; the common laws of one great territorial military, or feudal system; the factitious rights created by positive conventions; and latterly, the general cultivation of commerce and frequency of treaties, for its protection and extension. But many centuries elapsed after the settlement of the northern nations, before these causes came into powerful operation, or produced their destined effects—before any positive Maritime law of nations came to be recognized among the great European kingdoms. As remarked by Dr. Adam Smith, and as briefly illustrated in our “Historical view of the private law of Maritime commerce,” the civilization of Europe proceeded in an inverted order; the revival of civilization in the west commenced with the rise of the small commercial republics on the coast of the Mediterranean. The first Maritime international usages appear to have originated in the reciprocal traffic, and in the contests and wars which the trading cities of Venice, of Genoa, of Pisa, and Florence, of Marseilles, and of Barcelona, particularly the Italian republics, carried on for ages, with, or against each other. And the first traces of the Maritime law of nations, it should seem, are to be looked for and found in the records of the usages of these republics.

In tracing the history of the private law of Maritime commerce, we found various important regulations in the statutes, or strictly legislative enactments of Venice,

Pisa, Genoa, Marseilles, and Barcelona, supplying the defects, and correcting the errors of the consuetudinary, or common law. But in these particular statutes, we find scarcely any rules or maxims of an international description. Nor perhaps is this surprising. For it is not so much the legislative acts of particular governments, as the long established usages among independent states, in their reciprocal intercourse, and their treaties or conventions, that are the ordinary archives or records, or prove the existence of international law. It is therefore to such general customs, and usages, and treaties we have to look. And amidst the penury of national treaties, during the ages we are now contemplating, we must chiefly resort to such customs and usages, as confirmatory of, or realizing in practice, the principles of the natural law of nations, and as establishing practical rules founded on experience, where such principles may not apply, or afford definite directions.

Now the earliest collection of the general customs and usages of the European states, in their Maritime intercourse during the middle ages, and on the revival, and in the progress of civilization, is confessedly the collection denominated the *Consolato del Mare*, or *Costumbres Maritimas*. And among these usages are to be found the earliest practical maxims of Maritime international law, adopted not in obedience to the command of any one superior power, but by common consent, from considerations of their equity and general utility.

In the historical view we lately took of the private law of Maritime commerce, we had occasion to remark, along with the erudite Pardessus, that the *Consolato del Mare*, while there was no evidence for holding it to have been confirmed by the sovereign princes and republics, mentioned in the fictitious narrative prefixed to the printed editions, was manifestly not the ordinance

of any one sovereign, nor the legislative enactment of any one state; and although, in all probability, not compiled till early in the 14th century, was a judicious collection of almost all the Maritime usages which had been previously observed by the different trading republics of the Mediterranean, for ages preceding its date; and had, from the equity, and utility, and convenience of its rules, been voluntarily adopted by all these Maritime states, as a body of consuetudinary, or common Maritime law. Now of this interesting work, with which that eminent judge of the English High Court of Admiralty, Sir Leoline Jenkins, and the able English lawyer, Molloy, were familiar in the course of the century before last, and of which we have given elsewhere a sufficiently detailed account, the greatest part, although it does not decide questions, or contain regulations expressly and directly between nation and nation, is occupied in expounding equitable rules of conduct, between individuals in Maritime and commercial transactions, whether these individuals belong to one and the same nation, or not. These rules, too, are of such a common and general, or almost *universal* nature, as to be applicable in all places and times, and to have been adopted in practice among almost all Maritime and commercial states. And from the established practice of such states, in the free admission of foreigners to carry on commerce with them, under certain restrictions, the rules of the Consolato here referred to, which, in point of fact, appear to have been collected from the usages of a variety of Maritime states, constitute, in reality, the Maritime international law of these states, while in amity with each other. And almost the whole chapters of the Consolato, may thus be considered as a code of Maritime international law during peace.

In this celebrated work, we find also several chapters

expounding some of the leading doctrines of Maritime international law during war, both between belligerents themselves, and between belligerents and neutrals. A translation into English of the 273d and 287th chapters of the *Consolato del Mare*, on prize law, was published in the year 1800, by Dr., afterwards Sir Charles Robinson, the successor of Lord Stowell in the English High Court of Admiralty. But, while we point out this translation to the reader, we shall make our extracts from the more recent literal translation of the work into French, in the preparation of which M. Pardessus took the aid of M. Llobet, a merchant of Barcelona, and which the former has subjoined to the improved edition of the *Consolato*, published by him in 1831. And these extracts it may be proper to give at some length, that the reader may judge whether there be any foundation for the abuse which M. Hübner, the Danish jurist, in 1759, heaped upon this very interesting monument of the middle ages, apparently because it recorded doctrines, as then established in practice, adverse to those which that author felt himself called upon to maintain.*

I. In the first place, as between Maritime belligerents, we find the right of Maritime capture, and of thereby acquiring the right of property in vessels and cargoes belonging to the enemy, assumed as a matter of course, and as indisputable. Thus chapter 273 in the edition of Casaregis, published in 1740, and 231 in the edition of Pardessus, published in 1831, bears, when an armed vessel, going on a cruize or returning, shall meet a merchant vessel, if the latter belongs to the enemy, as well as her cargo, it would be useless to speak of it; because every one knows well enough what ought to be done; and to lay down any rule in this case, would be superfluous. Indeed the previous chapters, 227 and 228

* Emerigon *Traité des assurances* Pref. p. 8.

Casaregis, and 185 and 186 Pardessus, provide for the cases of ransom from imminent danger of capture, or from actual capture by the enemy; the merchants or owners of the cargo, being held bound to contribute, along with the owners of the vessel, proportionally to the ransom. And chapter 285 Casaregis, 243 Pardessus, provides for the case of a merchant vessel meeting another merchant vessel, belonging to the enemy, and resolving to fight the latter, in which case, the owners or master of the former were held bound to consult the merchants or owners of the cargo, unless the former could not otherwise escape, and were compelled to fight in self-defence. Farther, chapter 245 Casaregis, 203 Pardessus, provides who are to bear the loss, arising from sails, cables, anchors, or other appurtenances, being carried off by armed vessels, when the gain or profit earned by the vessel had not been such as to replace these articles.

II. In the second place, chapter 273 Casaregis, and 231 Pardessus, proceeds to distinguish the cases of the vessel and cargo belonging, the one to the enemy, the other to friends or neutrals, and provides as follows:

“ If the vessel which shall be captured, belongs to friends, while the goods which it carries belong to the enemy, the commander of the armed vessel may constrain the master of the vessel which he shall have taken as prize, to bring or deliver to him, what shall belong to the enemy; and may even oblige him to keep it, until he be in a place of safety; but for that purpose, it is necessary that the commander, or some person for him, should have fastened the captured vessel to his stern, at a place where there could be no apprehension of the enemy taking it from him; under the burden, nevertheless, of the commander paying to the master of this vessel, all the freight which he would have received,

if he had carried the cargo to the place where he was bound to discharge it, or in the manner written in the register, (bill of lading.) If eventually, no register (bill of lading) can be found, the master must be believed, upon his oath, as to the amount of the freight."

"Farther, if eventually, the commander, or his deputy, being in a place where he can deposit the prize goods in safety, desires the neutral vessel to carry the confiscated goods to a certain port, the master cannot refuse. But they ought to come to an agreement in this respect. And, whatever convention or agreement may take place between them, the commander, or his representative, must abide by it."

"If eventually, no agreement be come to, with reference to the freight, the commander, or his representative, must pay the master of the vessel, who shall have carried to the port or place which they shall have prescribed to him, the captured merchandise, a freight equal to that which another vessel would have received for such carriage of such merchandise, and even more, without any dispute or litigation; it being understood, that the payment ought not to be made till after the vessel shall have arrived at the place where the commander, or his deputy, shall have put the prize goods in safety; and that this place to which he shall cause the prize goods to be carried, shall be in a friendly country."

"When the master of the captured vessel, or any of the sailors with him, say that they have effects belonging to them on board, if these are merchandise, they ought not to be believed on their simple word, but reference ought to be made to the register of the vessel, if one can be found. If eventually, none can be found, the master or sailors must affirm the truth of their assertion. If they make oath that the merchandise belongs to them, the commander, or his deputy, must deliver to them the

goods without dispute; regard, however, being had to the good character and estimation which they enjoy, who shall make oath, and reclaim the goods."

"If the captured master refuse to carry the enemy's goods, which shall be found on board his vessel, to the place where those who have taken them as prize, may be in safety, notwithstanding the order which the commander has given, the latter may sink his vessel, or cause it to be sunk, if he chooses, provided that he shall save the persons on board the vessel; and no authority can call him to account for so doing, whatever may be the demands or complaints made against him. But it must be understood, that the whole cargo of the vessel, or the greater part of it, belongs to the enemy."

III. In the third place, "the captured vessel may belong to the enemy, and its cargo to friends or neutrals. If so, the merchants who are on the spot, and to whom the cargo belongs, ought to agree with the commander to purchase, at a suitable price, the vessel which is lawful prize; and he ought to offer them a composition, or reasonable bargain, without subjecting them to any injury. But, if the merchants will not make an agreement with the commander, the latter has a right to place a new crew on board, and to send the vessel to the place where he himself may have fitted out, and the merchants are obliged to pay the freight of the vessel, in the same way as if it had carried their cargo to the place for which it was destined, and nothing more."

"If eventually, the merchants experience any damage on account of the violence which the commander may have done to them, the latter is not responsible to them for any thing, seeing they have chosen not to come to any agreement with him for the ransom of the vessel, which was a lawful prize; also for another reason, because the vessel is often worth more than the cargo."

" If, however, the merchants have announced a desire to enter into an agreement, as aforesaid, and the commander has refused, from pride, and a spirit of arrogance, and, as aforesaid, has carried away, with the merchants, the cargo, to which he had no right, the latter are not bound to pay freight in whole, or in part, to the commander. On the contrary, he is bound to make restitution and reparation to them, for all the damage which they may have experienced, or may possibly experience, in consequence of his violence."

" But when the armed vessel finds itself with the prize in a place where the merchants cannot fulfil the agreement which they have made, if the merchants are well known respectable men, and such that there is no reason to dread any failure on their part, to execute the agreement made with them, the commander ought not to use any violence towards them; and if he does violence to them, he is obliged to pay the damage which they may suffer. But if, eventually, the merchants are not well known people, or cannot pay the ransom money, the commander may proceed as before-mentioned."

IV. In the fourth place, chapter 287 Casaregis, and 245 Pardessus, provides also, at considerable length, for the cases of capture and re-capture.

" If after a vessel shall have been taken by the enemy, some other friendly vessel meets the enemy who have made this prize, and in consequence of this rencounter, carries it off, in whatever way, from those who had at first taken possession of it, the vessel, and all the articles it contains, which have been re-taken from the enemy, ought to be restored to the person or persons to whom they belonged, if there be any one of them in life; under the burden, however, on them, of giving to those who have re-captured the vessel from the enemy, a sufficient recompense, in proportion to the trouble which they

shall have taken, and the damage which they shall have sustained."

"The above, however, must be understood of the case in which friends had re-captured the prize from the enemy, who had made it in the jurisdiction, and the waters of the country to which the vessel belonged, or at least, in a part of the sea where the enemy could not have yet moored it, that is, put it in a place of safety. Then there is no room for doing anything else than what is before-mentioned. But if the friends have re-taken the captured vessel from the enemy, in a place where the latter had moored and put it in safety, this is not the case of giving them recompense, unless of mutual consent; on the contrary, the vessel ought to belong to them, in justice, without any dispute."

"Again, if the enemy, who have taken a vessel from any one, see other vessels of whom they are afraid, and for that reason abandon what they had taken, and, if the vessel of which they were afraid, take and man, or bring into port the prize thus abandoned, it ought to be restored to the proprietors, if they are in life, or to their relatives, without any dispute, under the burden of the latter giving, conformably to what has been said, a sufficient recompense, to be agreed upon between them. If they cannot agree, the amount shall be referred to the arbitration of the Prud' hommes, (*Probi Homines.*)"

"If any one has abandoned his vessel from suspicion or fear of the enemy, and if another vessel finds it, mans it, and carries it into a place of safety; that is to say, if those who have manned the vessel, have not themselves taken it from the enemy, who had previously taken it from the proprietor, this vessel and the goods which are on board, ought *not* to belong to those who have found it; but the latter may exact a sufficient recompense, according to the usages of the sea."

"If, when the enemy shall have captured a vessel or some goods, they relinquish them voluntarily, and not from dread of a hostile vessel which they have observed, or from suspicion that there was one, any one shall find the vessel or goods thus abandoned in a place of safety, takes possession of them, and carries them off, the entire property ought not to remain with him, if a proprietor has been found; but there ought to be given him a sufficient recompense, according to the arbitration of the Prud 'hommes, the wise and discreet men of the place to which the vessel and goods may have been carried."

"If the enemy, having carried off a vessel or goods, abandon them, not of their own accord, but have been forced to it by the tempest, or the dread of other vessels, it shall be the same as in the cases where the enemy are obliged by force to surrender them."

"If the enemy find themselves in, or go to a place where they would wish to sell the goods or the vessel, which they have captured, those who shall have purchased are obliged to restore them to those from whom they have been taken, in case the latter should require it, and offer to return the price, and even giving them a profit, if the purchasers demand it."

"If the enemy, who have captured a vessel or goods, make, or have made, a donation of them to any one, this donation is not, and ought not, to be held valid. If, however, the enemy give, or restore the articles to the proprietor from whom they were captured, the donation is valid, and there is no room for dispute."

"But if the enemy say to the master to whom they shall grant this favour, 'we restore you your vessel free from all ransom, but we wish a ransom for the goods on board,' this donation is not valid, because the enemy had not their prize in a place of safety, and run the risk of losing their prize from some cause or another."

“What has been said of the vessel must be understood also of the effects or merchandise. If the proprietors, who shall be in the ship, or their partners, ransom the goods from the enemy, the master and co-owners are obliged to contribute to the ransom, according to value. But if the enemy, having had the vessel or the goods in a place of safety, namely, having carried them from the waters of the enemy, which is understood of a place where the persons from whom the capture was made, could have the assistance of their friends, make a donation or sale of the vessel or goods to any one, this donation or sale is valid, and ought to have effect, without any dispute, unless fraud could be proved.”

“If the enemy have made a sale to any one of a vessel or goods which they have captured, the sale is valid, and ought to have effect, provided those who have purchased can prove that the enemy made this sale to them in a place of safety, namely, when they had moored their prize in harbour.”

From the preceding extracts then, and from the contents of the *Consolato del Mare* generally, it appears that, in the course of the 12th, 13th, and 14th centuries, there had been unfolded or evolved, and, in the shape of usages, adopted, collected and recorded, a considerable portion of the doctrines of the Maritime law of nations, not only during peace, from the greater part of the usages so collected and recorded being of a general and common nature, applicable between the inhabitants of different independent countries, as well as between the inhabitants of one and the same country; but also during war, between belligerent states themselves, and between belligerent and neutral nations. Not only was the right of belligerent states to make prize of the vessels and cargoes, belonging to the citizens or subjects of opposed belligerent states, held to be clear, and beyond dispute.

It was also held to be the right of a belligerent to seize the goods of the enemy at sea, although on board of a neutral vessel, and even to compel the neutral vessel to convey the captured cargo to a place of safety, upon payment of the stipulated, or other reasonable freight; and if the master of the neutral vessel refused, to sink his vessel, saving the lives of the crew. The right of the belligerent to make prize at sea, of vessels belonging to the enemy, was likewise considered as a matter of course. And if the cargo, or part of the cargo, belonged to neutrals, the captors and the owners of the goods, or merchants, who, in these ages, usually accompanied the subject of their adventure, were required to make a bargain, with regard to the farther conveyance of the goods or otherwise. And if they could not agree, the captor was authorized to put a new crew on board the vessel, and to send the prize to the port where he had fitted out, the owners of the goods paying the freight stipulated for conveyance, to the originally destined port, and no more. Provision was also made for the cases of re-capture of friendly vessels and cargoes, which had been captured as prize by the enemy. If the re-capture was effected while the prize was still within the waters and jurisdiction of the country to which she belonged, restitution to the original owner was ordered, on payment of suitable salvage, corresponding to the danger or damage incurred, and to the exertions made in the re-capture. But if the re-capture was effected from the enemy, after the latter had carried their prize to a place of safety, and there moored her, the vessel was held to belong to the re-captors, who were not bound to restore on payment of salvage, unless they chose; the property being held in this case to have been transferred to the enemy before the re-capture.

The Consolato does not seem to have made any dis-

inction between the cases of capture by lawful belligerents, and capture by pirates. Nor does it specify any length of time, during which the captured vessel must have been in the possession of the hostile captor, to transfer the property. But its regulations appear, in general, to be very equitable. And, being the collected wisdom of a series of ages, and of a variety of Maritime states, they appear to have served the purpose, and to have possessed the influence of Maritime international law, for a considerable period after its publication, and to have been adopted by the Spanish and Portuguese nations, when such questions happened to arise in the course of their subsequent Maritime expeditions to South America, and the East Indies. For although the more enlightened princes of the Southern Kingdoms or Provinces of Spain, excited by the example set by Barcelona and Valentia, promulgated in succession, a variety of Maritime and commercial laws, such as the *Chapitres sur les Armemens en Course* about 1330, and the *Ordonnance sur les Courses Maritimes* de 1356, published by Capmany, and afterwards by Pardessus, we find upon investigation we should form a very erroneous idea of these pieces of legislation, if we supposed they had for their object, to lay down the laws of Maritime war, the lawfulness of prizes, or the manner of adjudicating the disputes, to which captures and re-captures may give rise. They contain very little on such matters; and are almost entirely devoted to the regulation, in the most minute particulars, of the different engagements undertaken between the owners and fitters-out, and the captains and crews of vessels, armed as privateers.

SECTION III.

Of the later Collections of Maritime International usages, during the Middle Ages.

WE have thus noticed the earliest recorded Maritime international law of modern Europe; the international law of the southern, and earliest civilized nations of that most important quarter of the globe; originating not in the legislative fiat of any great Potentate, or combination of powers, but gradually growing up during the peaceful and the warlike intercourse of the greatest Maritime states then in existence, and adopted in common by these various states, as just or equitable in the circumstances, or as generally expedient or convenient, or as the best rules of action which could be devised or accomplished in such matters. We shall next inquire, whether among the western and northern Maritime states of Europe, we find, as they gradually rose to greatness and prosperity, any similar usages not emanating from any great Potentate, but adopted in common, by various states, from the considerations just alluded to, as applicable to the condition, either of peace or war.

In our historical view of the private law of Maritime commerce, we remarked, that next to the Consolato del Mare, the most important collection of Maritime usages in the west of Europe, during the middle ages, is the Rôles d' Oleron. And in this collection we certainly find many of the rules of private Maritime law or jurisprudence, still in observance. Nay, we find that the greater part of these recorded rules and usages, are of such a similar, general and common nature, as to be equally applicable in a state of peace, to the inhabitants

of different independent countries, in their intercourse with each other, as to the inhabitants of one and the same country in such intercourse. And accordingly, these rules and usages appear, in point of fact, to have been observed and acted upon by the inhabitants of the west and north coasts of France and Spain, by the inhabitants of the south and east coasts of England, and by the inhabitants of the Netherlands, not only in their domestic intercourse among themselves, as fellow-subjects or citizens, but also in their foreign intercourse, as belonging to different nations, and living under separate independent governments. So far, therefore, the *Rôles d' Oleron* may be viewed as presenting an international code of Maritime law under pacific relations. But in this collection, we find scarcely any express or direct international regulations for a state of warfare, except what relates to shipwrecked foreigners and their goods, and to the protection to be afforded them, terminating in the abolition of the barbarous abuse, called the *Jus Naufragii*.

The same remarks apply to the other and more northern collections of early Maritime laws and usages, such as the judgments or decisions of Damme, the laws of West Capelle, the customs of Amsterdam, and the laws of Wisby; which all contain many Maritime rules, that, from their general and common nature, are applicable to the inhabitants of different independent states, not only in their domestic, but also in their foreign intercourse, during a state of peace; but scarcely any international regulations, either directly such, or applicable to a state of war.

Nay, the same remarks apply even to the still later, and indeed the latest European collection of consuetudinary Maritime rules, which did not emanate from any particular sovereign or government, but was com-

piled from the usages of many Maritime states, and digested into one body of law. We allude to the Maritime regulations of the once powerful confederacy of the Hanse towns, the *Jus Maritimum Hanseaticum*, printed in German, at Hamburgh, in 1657, by Kuricke, with a Latin translation and commentary, and reprinted in 1740, in the collection by Heineccius, entitled, *Scriptorum de Jure Maritimo Fasciculus*. This work is certainly a much better digested collection of the rules of the private law of Maritime commerce, than any of the preceding collections before noticed. Its rules are of such a general, common, and similar nature, as to be applicable to intercourse between the individual inhabitants of different independent countries, when at peace with each other, as well as between individuals of one and the same nation. And to this extent, the compilation may be viewed as a body of international law, for the Maritime commercial intercourse of independent nations, during peace. But it does not appear to contain any regulations specially applicable to Maritime international rights, during war.

It must not be imagined, however, because they were not inserted in the Maritime code of the Hanseatic league, that no customs or usages existed, during these ages, in the north, as we have seen they did in the south of Europe, for the regulation of Maritime intercourse during war, between the members of that league and the subjects of other belligerent and neutral governments. For not only did Loccenius, as we shall afterwards see, in his work *de Jure Maritimo et Navali*, published at Stockholm in 1652, treat of such Maritime international doctrines applicable to the state of warfare, as having for ages been recognized among the nations bordering on the North Sea and the Baltic, we find also from other historical monuments, that such usages were

in these early times, either observed by such nations, or were the subject of controversy among them. We find that early in the 15th century, (1434), the deputies of the Hanse towns, assembled at Lubec, had grave deliberations on the restrictions then imposed on the privileges and immunities which they had obtained in many countries, and which had been so long protected. We find also that towards the close of the same century, (1492),* these confederated trading states complained grievously of the hardships and alleged injuries they sustained, in consequence of the war then carried on by the king of Denmark, and his ally the king of Scotland, against the king of Sweden, and of the interdiction of commerce between these countries. In point of fact, as we have shown elsewhere, these confederated states being situated in a variety of different kingdoms and principalities, and owing their commercial prosperity in a great measure to the factories which they were allowed to establish, and to the exclusive privileges which they managed to obtain in foreign countries, and no where more than in England, were necessarily exposed to the risk of having their trade interrupted and damaged, when the governments of the larger countries, in which their towns or factories were situated, went to war with each other. It could not be reasonably expected that the governments of these larger states would allow the Hanseatics to carry on a direct commerce between the belligerent countries, within whose territories they were resident. And the exclusive privileges which they contrived to obtain from these different governments, from whatever motives granted, were merely monopolies, or other advantages within their territories, which these governments might of course grant, but which as con-

* Werdenhagen, *De Rebus Publicis Hanseaticis*, 1651, p. 416. Holst, Versuch 20—21.

cessions for a time, or indulgences, they might also recall, upon a change in the relative circumstances of the countries and states, and were not rights in perpetuity, founded on the natural consuetudinary law of nations.

Farther, we find similar and more full notices of the discussions in these early times, of the doctrines of Maritime international law during war, in the later and more philosophic historian of the Hanse towns, M. Sartorius, in his *Geschichte des Hanseatischen Bundes*, published in 1803 and 1808. Thus throughout the important period of the Hanseatic confederacy, which elapsed between the year 1373, and the year 1494, during which their power seems to have been at its greatest height, one grand object with them, Sartorius informs us,—“one of their chief endeavours was, the securing to themselves, without interruption, free trade, as neutrals, in relation to foreign nations, engaged with each other in Maritime war. They frequently made conditions and stipulations with foreign powers, on this subject; but it seldom happened that the engagements thus contracted were not entirely broken. Their power alone could protect them, or enable them to enforce such stipulations. And while the dread they inspired, made their nearest neighbours in the Baltic, refrain from such proceedings in breach of faith, the French and English, from their distance and greater power as nations, were less observant of such engagements.”

“The Hanseatic merchants,” observes M. Sartorius, “were too knowing, not to be aware of the advantages which would accrue from the maintenance of such an unlimited freedom of trade, during war, as enabling them to supply both belligerents with safety, and in fact, to carry on, in a great measure, the Maritime traffic of both.”* And if they did not originate, the Hanse towns

* Sartorius, *Zweiter Theil*. S. 661—2—3.

seem to have been the earliest supporters of the maxim, 'free ship, free goods.'"

"But although zealous supporters of the complete freedom of the seas in time of war, for their own merchants and traders," Sartorius observes, "the Hanse towns were by no means disposed to make the like concessions to others, when they themselves happened to be involved in Maritime hostilities. People on all sides then talked of prohibited or contraband goods, of warlike implements or stores, which neutrals should not carry to either belligerent party. People then had convoys, passports, certificates, visitations of ships, as well as in later times; without, however, the grand society of nations having come to any common understanding, or having been able to procure respect for concluded treaties."

"What, centuries afterwards," continues Sartorius, "it is still so difficult to attain, could not in those ages be demanded as a perfect or absolute right. What alone protected them in such a lawless state of matters, was their power and their reputation, and the dread which they excited in the Baltic seas, where they were then unquestionably all-powerful."*

During the period also of the confederacy of the Hanse towns, which elapsed from the year 1497, to the year 1614, and 1668, we find from the same intelligent writer, that the rules of international law, during war, were discussed, so far recognized, and so far contested. From about the commencement of that period, the Hanseatic confederacy began to decline in power; and from causes which we have elsewhere endeavoured to explain, was virtually dissolved. In consequence of this diminution of power, the history of the commercial relations of the Hanse towns with other nations is, during this period, still more full of complaints on their part,

* Geschichte des Hanseatischen Bundes. Zweiter Theil. S. 662—3.

that their pretended free neutral flag was less, or not at all respected. "A common or general statute, or legislative enactment," says Sartorius,* "such as would be nearly justice or equity,—such as would be available to the weak, could still less be established in these times than at present. Formerly the Hanseatic states knew how to avail themselves of the only means which can be of service, under such relations, namely, to interpose with power. But such a measure was now much less likely to prove successful; and if it was occasionally attempted, during the first half of the period we are now contemplating, such a measure could no longer be resorted to, towards the close of it; because the Hanse states had then become too weak. And it was upon the occasion of such complaints being brought forward at the Hanseatic congresses, that people remembered, how in former times, reprisals had been used in such cases, and force repelled by force; while now, from the perverseness of the times, they could not employ force, but must submit, entreat, and supplicate."

"The Hanse states," continues the same author, "as neutrals, demanded freedom for their merchandise, even for what might be found on board hostile vessels; freedom for their neutral flag, to trade to the countries of the belligerent states, to carry to these countries their own native Hanseatic and also foreign goods, as well as to export from the countries involved in war, all and sundry goods and wares, and to carry them thence to any places whatever; at most, perhaps, they promised to abstain from the conveyance of ammunition or war-like stores, to the countries engaged in war; and not to carry on the trade of these countries under the Hanseatic name; while both the one and the other of these particulars were but little obeyed, or observed by individual

* Geschichte des Hanseatischen Bundes. Dritter Theil. S. 507.

mercantile people, even although the Hanseatic government, and the magistracies of its different cities, interdicted such proceedings."

"But these very liberal principles," continues Sartorius, "the Hanseatic states did not follow or observe, in relation to neutral nations, when they were themselves involved in war. In their decline, when they became the weaker party, they behoved to suffer often, and much; yet they also frequently, and to a great extent, studied and pursued their own advantage, careless whether their national treaties and engagements permitted such proceedings, or not."*

So much for the one-sided administration of Maritime international law by the Hanseatic states. Independently of their want of foundation in fact and law, their pretensions were justly resisted by the governments of the neighbouring kingdoms, because they refused to other nations, what they claimed for themselves. Legal reciprocity is but another name for distributive compulsory justice.

SECTION IV.

Of International Treaties, and of the Statutes, Ordinances, and other Regulations of Maritime States during the Middle Ages.

So much for the international usages in peace and in war, of the Maritime states of the north, as well as of the south and west of Europe, during the middle ages, particularly from the 12th to the 15th century, inclusive. As formerly observed, the international treaties, and the

* Sartorius, Geschichte des Hanseatischen Bundes. Dritter Theil. S. 507, 510.

legislative enactments or ordinances of particular states, which relate to Maritime international law, are still, during this period, comparatively infrequent. The statutes or ordinances established in the course of these centuries, by the different European governments, such as those of Spain and Portugal, of France, of England, of the Netherlands, of Denmark, and of Sweden, contain but few regulations of a properly international nature, except with regard to shipwrecks, duties and customs, or indirect taxes on commodities, imported or exported, grants of privileges to foreign merchants, and rules for their conduct, grants of privileges to native merchants, and of power to them, when resident in foreign countries, to appoint judges for determining disputes among themselves.*

Still, however, even during the 13th, 14th, and 15th centuries, certain international treaties were entered into, and certain internal legislative enactments, ordinances, edicts and proclamations were made, or issued, by particular states, either confirmatory of the rules previously recognized in practice, or modifying these rules for the attainment of particular objects, or in consideration of reciprocal advantageous stipulations or concessions. And these, it may be proper shortly to notice, in illustration both of the common or consuetudinary, and of the conventional branches of the law. But here we must always bear in mind, the manifest distinction explained in chapter I, between treaties among two or more nations on the one hand, as constituting the particular law of nations, which has been denominated conventional, and which is valid against the contracting parties, to the extent of the reciprocal stipulations, and as long as the treaty endures; and on the other hand, the statutes, ordinances, or other

* Martens, Guide Diplomatique. Tom. I. et II.

sovereign regulations, and the judicial determinations of the courts established by different nations, as forming the common or consuetudinary law of nations, so far as consistent with the recognized principles of the natural or necessary law of nations, but having no obligatory force against other nations, so far as inconsistent with these recognized principles, and valid only against the nation establishing such statutes or ordinances, or by its tribunals pronouncing such decisions, upon the obvious principle of reciprocity, that a nation is not entitled to object to the application to itself, of the same system of international law which it applies, or administers to other nations: *Quod tibi fieri non vis, alteri ne feceris*.

Of the treaties during the 13th, 14th, and 15th centuries, which have been handed down to posterity, we find, as before remarked, the number to be small, and the earlier ones not very applicable to regular Maritime warfare between belligerents. Indeed, the piracy so universally prevalent during the earlier part of the middle ages, greatly obstructed intercourse by sea; in a manner closed the different European countries against each other; and made the inhabitants shun the approach of the foreigner, as being in reality that of the enemy. In the earlier treaties accordingly, the chief articles of stipulation were, that the contracting nations should allow each other free admission for the purposes of trade, and endeavour to establish some rules for the security of such commercial intercourse; that their respective citizens or subjects, should not plunder each other at sea in time of peace; that they should not admit into their harbours any vessels belonging to pirates, (the chief trading people of these days), laden with booty, for the sale of the plundered goods, especially if it was proved that these goods had been taken from one

of the contracting parties; and that they should rather unite and act in concert, and support each other, particularly against pirates, and deliver up to the owner such goods as they might find to have belonged to the subjects of either state. See treaties 1230 and 1303, Leibnitz Cod. Jur. Gent. Dip. pp. 12 and 43, and treaty 1422, Leibnitz. Mantissa Cod. Jur. Gent. Dip. p. 163.

In these older treaties, there does not appear to occur any description or enumeration of what goods one might, or might not, lawfully carry on board his vessel, as being contraband of war. Those communities only who had connected themselves more intimately by alliance, or had entered into a defensive armed league, appear to have strictly observed the rule, that no one should supply the enemy of the other with warlike stores. And the nations generally, appear to have left this matter, very much, to each others gradually, though slowly, improving feelings of justice and equity, until the indefinite nature of the goods, which impartiality forbade a neutral to convey to an enemy, and the disputes consequent thereon, led to the enumeration of such articles by special paction, between particular states.

But although articles contraband of war, were not specified in these older treaties, no doubt was ever expressed in them, directly or indirectly, of the property of the enemy being legally liable to seizure, not merely within his own territory, but also when exposed in the open seas, the high-way of nations, although in the temporary possession of others. Such, we have seen, from the *Consolato del Mare*, was the invariable practice among the Maritime states of the Mediterranean. And such was the rule recognized in almost all, if not all, the early treaties among the European nations. Indeed, not only do all the treaties prior to the 17th century,

appear to have confirmed this pre-existing usage and rule of the common consuetudinary law; many of these treaties go to establish the right of belligerent nations to a much greater extent.

The ordinance concerning les Armemens en Course, attached to the Consolato del Mare, but which belongs to Aragon, and the laws of 1252 and 1266, regarding the commerce of the ports of Castile and Leon, like the subsequent ordinance of Maximilian, establishing a court of admiralty in the Netherlands, so far regulated the rights of privateers and the captors of prizes; but are chiefly occupied with matters, not so much of international, as of internal public, or constitutional law.

In a treaty between England and Portugal in 1294, king Edward I. stipulated that the Portuguese merchants should not freight the vessels of Spaniards, then at war with England, and load them with their goods *sub aliquo colore*; nor even load the goods of the enemy in their own vessels. Rym. vol. II. p. 632.

In 1327, in the reign of Edward III. a Flemish ship having been taken, and brought into Yarmouth, when a war existed between England and Scotland, the king's mandate issued on the petition of the Flemish claimants, for restitution of the vessel, with a proviso respecting the enemy's property. Rym. vol. IV. 328. Coll. Marit. p. 37.

The English statute of Edward III. in 1333, specified the time, within which the subjects of the enemy behaved to depart with their goods, after the proclamation of war, and determined the conditions on which letters of marque should be granted.

From the letter of king Edward III. of England, in 1343, *ad Petrum, Regem Aragoniæ, de Marchá supersedenda*, it appears, that resistance by neutral vessels was held to be a ground of condemnation, *juxta Legem*

Maritimam, selon la Loi et Costumes de la Mer; nam quod gentes vestrae ex culpâ suâ senserunt, non debent aliis imputare. Coll. Marit. p. 13, 15.

By a treaty with Spain in 1351, England agreed that goods proved to be Spanish, on board of the ships of the enemy, should be restored. And in 1357 there was an enlargement of the terms of this last mentioned treaty, by an agreement on the part of England, that the produce or property of the enemy on board Spanish vessels, should not be seized. The preamble, however, states, that this agreement was merely temporary, and under the special consideration that France had made the same concession in favour of English merchandise. And, being contrary to the system of Spanish prize law, then in practice, such a stipulation or concession does not occur in the subsequent treaties between England and Spain in the year 1414, 1430, and 1467. Coll. Marit. p. 36, 37.

In 1370, by a treaty between king Edward III. of England, and the government of Flanders, it was agreed that the subjects of the latter should entirely abstain from carrying the goods of the enemies of England; that the government of Flanders should take security to that effect, and grant passports; and that on exhibiting such passports, the Flemish vessels should be allowed to pass free.

In 1373, when Edward III. was at war with Spain, a mandate was issued for restitution in the case of a Portuguese ship, with the following proviso, quod omnia Bona et mercandisa inimicorum nostrorum, quae in dictâ navi, inventa fuerunt, salve et secure, absque deliberatione custodiantur. Rym. vol. VII. p. 3.

The French Ordonnance of 1400 recognized, as vested in the admiralty, all jurisdiction regarding captures of war, and other matters arising at sea; regulated the

proceedings in matters of prize before the admiral, or his depute; directed, on suspicion of enemy's property, an examination, whether the captured vessels and goods had really belonged to the enemy, or not; directed the captors to be punished for misconduct; awarded compensation for damage done; ordained that the ancient customs and usages of the sea should be observed; required an oath to be taken by the cruizers before going out of port, for their good conduct; and directed the sale and distribution of prize goods to be made by order of the court of admiralty. *Code des Prises*, published in 1784.

By the treaty between Henry IV. king of England, and John, Duke of Burgundy and Count of Flanders, in 1406, it was agreed that a friendly flag should not cover the goods of the enemy. *Dumont, Corps Dip. Tom. II. p. 302.* And the same rule was recognized forty years afterwards, in the treaty of commerce between Isabella, Duchess of Burgundy and of Brabant, on the one side, and England on the other. Aug. 1446.

In 1417, 5 Henry V. it was agreed between England and Flanders, *Que les Marchands, &c. de notre dit pays de Flandres, ou demeurans en Flandres, ne amenront par fraude, ne couleur quelconque, aucuns biens ou marchandises des enemies des Englois, par mer; et, en cas qu' ils en soient demandez, par aucuns escumers ou autres gens de la partie d' Engleterre, eulx en feront juste et pleine confession.* *Rym. vol. IX. p. 484.*

In 1426, in the reign of Henry VI. of England, a statute was passed, which bore, that goods taken in the vessels of the enemy, should not be restored, although they belonged to friendly nations. But this statute being contrary to former usage, and the common law of nations, as recognized by England, appears to have been allowed to expire.

The proclamation of king Henry VI. of England, in 1426, directed a judicial inquiry before the admiral, or his general depute, into the property of vessels and goods captured at sea. Rym. vol. X. p. 368.

In 1436 and 1437, there were promulgated an ordinance by Henry VI. of England, in favour of the Portuguese, and a corresponding reciprocal ordinance on the part of Portugal; "*Ordinamus quod quaevis naves, vel navigia, dicti regni Portugaliae, et suae dominationis, quae portabunt literas firmatas serenissimi Regis Portugaliae, vel etiam suorum officialium habentium onus in portibus suae Dominationis, quae faciant fidem, quod dictae naves vel navigia, (eas, et earundem magistros, nominibus propriis nominando), non deferant bona nostrorum inimicorum, praedictas naves vel navigia, non quaerant, neque impediant, neque aliud malum vel damnum inferant.*" Rym. vol. X. p. 675.

The following stipulation was inserted in the treaty of commerce, between king Henry VI. of England, and the republic of Genoa, 13th February, 1460, Dumont, Tom. III. p. 583. "*Nec caricabunt, nec portabunt, in navigiis, eorum supradictis, bona, aut Mercimonia alicujus inimici nostri, aut inimicorum nostrorum, et casu, quo fecerint, petiti et interrogati per nostros, dicti Januenses, debent immediate et sine dilatione (mediante juramento suo, cui subditi nostri fidem dabunt) veritatem dicere, et fateri quae, et qualia bona inimicorum nostrorum, vel inimici, ducant in navibus suis; et illa, sine difficultate tradere, et diliberare capitancis vel ducentibus navigia nostra pro custodia maris, vel aliis subditis nostris, quos obviam contingeret, navibus dictorum Januensium, ubicunque super mare, recipiendo, pro ratâ nauli, sive affectamenti, hujusmodi Mercium inimicorum,*" &c.

The treaty of commerce between Edward IV. king

of England, and Francis, Duke of Bretagne, in 1468, repeats verbatim, the stipulation contained in the treaty of 1446. Dumont, Tom. III. p. 598. Rym. Fœd. Tom. XI. p. 618. The treaty between Henry VII. king of England, and Francis, Duke of Bretagne, in 1486, repeats the stipulation that a friendly flag shall not cover the goods of the enemy. Dumont, Tom. III. p. 159. Rym. Fœd. Tom. XII. p. 303.

In a treaty between England and Denmark, in 1490, certain privileges were conceded to English merchant vessels, "*Proviso semper, quod sic navigantes bona inimicorum nostrorum Regum Daniae, navibus suis, nullo modo deferant.*" Rym. vol. XII. p. 383."

The treaty of commerce between king Charles VIII. of France, and king Henry VII. of England, in 1497, contains many regulations for the Prize proceedings of the 15th century, corresponding with the practice of the present times, and which are referred to in later treaties, as *Nonnulla Salubria Statuta*. Coll. Marit. p. 83—104.

The treaty of commerce between Henry VIII. king of England, and Philip, Archduke of Austria, Duke of Burgundy and Brabant, February, 1495, contains the following provision. "*Item Conventum est, ut super, quod Subditi unius Principum praedictorum, sive Mercatores fuerunt, sive nautæ, magistri navium aut marinarii, non adducent, seu adduci facient, per mare, fraudulose, vel quorumcunque colore, aliqua Bona, seu Mercandisas, inimicorum alterius, eorundem Principum; et si secus, egerint, et per subditos alterius Principis, Guerræ licite operam dantes, super hoc interrogati fuerint, tenebuntur facere, veram, plenam, et justam, confessionem, et declarationem, cui in eâ parte, pro tunc stabitur, iidemque interrogantes ulterius scrutamen, in eâ parte, non facient. Sed si postea, eundem interrogatum falso respondisse,*

constitevit, tunc idem interrogatus interroganti, quem per falsam responsionem defraudavit, tantum de suo erogare tenebitur, quantum Merces inimicorum per eum vectas, et ut praemittitur, celatas, valuisse constabit. Dumont, Tom. III. p. 322.

But not only in these times, did the different European Maritime states frequently become bound by express conventions, as well as by usage, not to carry or cover the goods of the enemy of either of the contracting parties, they sometimes even stipulated that the goods of the subjects of either contracting party, found on board a ship belonging to the enemy of the other, should be lawful prize to that other contracting party. Thus the treaty of commerce between Edward IV. King of England, and Francis, Duke of Bretagne, in 1468, contains a stipulation to the above effect; and this stipulation is repeated in the treaty between Henry VIII. King of England, and the same Francis, Duke of Bretagne, in 1486. Nay, in 1543 and 1584, France went so far, (we shall afterwards see), as to declare that not only should the goods of the enemy, on board neutral vessels, be confiscated, but also, that all the remaining goods found on board such neutral vessels, should be held lawful prize; nay, that even the neutral vessel itself should, in such a case, be confiscated; contrary, (as we have seen from the Consolato), to the practice of the Maritime states of the Mediterranean, according to which the goods of neutrals, though on board hostile vessels, were respected, unless contraband of war.

SECTION V.

Remarks on the Maritime International law of the Middle Ages.

HAVING thus briefly surveyed the Maritime international law of the middle ages, partly as conventional to a small

extent, namely, as emanating from international treaties, but chiefly as common consuetudinary, as originating in the experience and usages of nations in relation to each other, giving effect so far to the rules of the natural law of nations, recognized and adopted from necessity, from feelings of justice and reciprocity, and views of general expediency and convenience, and as recorded in the collections of consuetudinary laws, and other state documents, during these times, we may stop to make a few remarks, suggested by the preceding details.

In tracing the effects of the settlement of the northern nations in the European provinces of Rome, we found, that what was called the right of private war was exercised at sea, as well as by land; that even while the nation and government to which they belonged, were at peace, individuals undertook Maritime expeditions, against the subjects of other governments, under the plea or pretence of obtaining justice or reparation for injury, but usually for the purpose of plunder and depredation. We found, also, that in the progress of time, such abuses were, in a great measure, checked, by governments prohibiting such expeditions during peace, except under the national authority of letters of marque or reprisal, or requiring security to be given before the departure of such armed vessels from port, that the commanders should not make any such reprisals.

Such private Maritime expeditions for similar purposes, real or pretended, were, of course, more frequent, and more difficult of control, during the almost incessant warfare in which the European nations were for ages involved. And for a long time, we found the sovereigns of these nations rather encouraged such enterprises. The abuses, however, resulting from such a practice, came to be more strongly felt, in proportion to the advancement and extension of navigation and Maritime commerce.

And it is perhaps, with Martens, to be regretted, that the European Maritime states did not, about the close of the period we are now surveying, at once put an end to this private war at sea, as was done with regard to private war by land; so as to restrict Maritime war to the operations of the national navy of the sovereign. But, being unable to come to the resolution of renouncing a mode of annoying the enemy, without the expense thereof falling upon themselves, these governments thought fit to choose a middle course, by imposing on such of their subjects as, after a declaration of war, chose to arm against the enemy, the same necessity of obtaining the permission of the sovereign, which had been imposed on them for the use of reprisals in time of peace. And in this way, one considerable improvement was effected, by establishing the distinction between regular national warfare and piracy, of which the consequences had been found so ruinous to Maritime commerce.

Still, however, though thus legalized, this species of private warfare was attended with abuses. The commanders of privateers, when on the high seas, were apt to exceed their powers, and to oppress not merely hostile, but neutral merchants. To provide against such evils, various measures were resorted to by the European governments; such as special instructions, security for good conduct, before the departure of the privateer, and making examples, by the severe punishment of delinquents. But still there was a great distance between the promulgation of such laws and their execution; the remedy proved incomplete. The power of granting letters of marque, or reprisal of war, was afterwards delegated to the chief commanders of the naval forces, under the name of admirals; and the right of adjudicating prizes was vested in the courts of admiralty. Thus

the ordonnance of Charles VI. of France, of 3d December, 1400, before referred to, bears, "Si aucun de quelque estat qu'il soit, mettoit sus aucun navire, à ses propres depens, pour porter guerre à nos ennemis, ce sera par le congé, et consentement de notre dit Admiral, ou son Lieutenant," &c.* In England, the statute 1414, obliged privateers, that might have captured anything from the enemies of the state, to conduct their prize into an English port, and to give intimation of it to the conservator (justice) of the peace, before disposing of it, under pain of confiscation of their vessel, and of the prize.† And in like manner, the Ordinance for the admiralty of the Low Countries, promulgated by Maximilian and Philip I. prescribed that no person shall fit out an armed privateer, without the express permission of the admiral, or his lieutenant; and that the commander, master, &c. shall swear not to pillage fellow-subjects, or those of friendly powers.‡

While the international law of the Maritime states in the south of Europe, arose amid their almost equal contests with each other, the international practice, on the other hand, of the Maritime states of the north of Europe, was, for a long period, a good deal influenced and affected by the preponderance of the Hanseatic confederacy. As the different states of that confederacy had little territory, beyond the limits of their cities and towns, and were situated at a distance from each other, in the territories of powerful sovereigns, the inhabitants of these states had no common tie but their commercial interests, and little or no love of native country or patriotism, beyond their respective civic boundaries. The great object of the confederacy, and of the individual states which composed it, was to accumulate wealth, by carry-

* Code des Prises, Tom. I. p. 1. † Henr. V. cap. 6.

‡ Von Martens, *Essai sur les armateurs*, p. 33, 34.

ing on, not only their own native trade, but also the coasting and foreign trade of all the kingdoms and provinces adjacent to the North Sea and the Baltic. For this purpose they sought, and for a long time obtained, immunities, exclusive privileges, and settlements, and factories, in almost all these different kingdoms and provinces. While they thus engrossed and monopolised almost all the trade of the adjacent or surrounding countries in time of peace, the Hanseatic merchants had likewise the sagacity to see that they might turn the quarrels of their great neighbours to account, by carrying on the commerce of the Maritime belligerent nations. To effect this object, they maintained they were entitled to protect at sea, the property of either belligerent, against seizure by the vessels of the other opposed belligerent, or that "free ships made free goods." And when the naval power of the league was comparatively great, it appears they succeeded in enforcing this doctrine. But when, from the operation of causes which we have noticed elsewhere, the Hanse towns lost their supremacy at sea, and the league was virtually dissolved, they were under the necessity of abandoning these pretensions. And the claims of the neutral flag, which seem thus to have originated with the Hanse towns, we shall see have since been the subject of dispute among the Maritime European powers, from the reign of Queen Elizabeth of England, to that of the Empress Catherine of Russia.

In the Maritime international law, recognized during the period we have been considering, by the Maritime nations of the Mediterranean, and arising out of their contests with each other, the right of visitation and search, as it is called, which has made such a prominent figure in the international discussions in Europe for the last eighty years, is not expressly brought forward as a separate and independent right. But it is clearly im-

plied in, and comprehended under, the right to seize the goods of the enemy in vessels of any description, whether hostile or neutral, and warlike stores recognized as contraband of war, even although the property of neutrals. Indeed, the right of search is not, in correct idea or expression, a primary and independent right of itself. It is not a legal claim to an object to be possessed, used, or enjoyed; but merely the means of ascertaining whether, in point of fact, the right of capture or prize exists; in the same way as a suit at law, before a court of justice, is the means of ascertaining whether the right exists, as well as of afterwards enforcing it. In this respect, therefore, the non-enumeration of the right of search, as a primary and independent right of itself, was perhaps more correct in legal phraseology, than the important place which has been assigned to it in more recent times.

CHAPTER V.

OF MARITIME INTERNATIONAL LAW IN THE COURSE OF THE SIXTEENTH CENTURY.

SECTION I.

Explanatory Observations.

IN the course of the 16th century, the age of Charles V. Emperor of Germany, of Philip his son, king of Spain, of Francis I. of France, and of Henry VIII. and Elizabeth of England, very considerable progress was made in navigation, and nautical skill, and enterprise, and the Maritime and commercial intercourse of the European states was greatly increased and extended. In the progress of time various treaties were entered into by different independent states. Various internal establishments were formed by the governments of these nations, for the protection and encouragement of Maritime commerce; by which various international rules, founded on views of reciprocal advantage, came to be recognized.

Besides the effects of such conventional treaties and internal state arrangements, the external Maritime and commercial relations of independent kingdoms and communities, and of their respective citizens or subjects, were multiplied and extended. New cases for decision

more frequently occurred. The common or customary law of nations, founded on their natural juridical relations, which increased in number in proportion to their advancement in civilization, came to be more and more unfolded, and not only to be exhibited in usages transmitted by imitation, or oral tradition, or rudely recorded in written collections, but also to be arranged and illustrated by the talents of individual writers. Tribunals, too, more impartial, and more properly international, came in time to be erected in the different civilized nations of modern Europe. And the recorded judgments of these tribunals have now come to form one of the most valuable portions of Maritime international law.

In our farther investigation, therefore, of the progress of Maritime international law, from the 16th century, inclusive, downward to the present times, which, from the causes just mentioned, gradually became more extended and complicated, it may be proper, for the sake of perspicuity, to divide this long period into shorter periods; and also, during each of these shorter periods, to consider the law as derived from so many separate sources, or (rather) as embodied in so many separate records.

In the Maritime department, we do not find exactly the same principles for division into periods, which we did in tracing the history of international law generally, as a science; namely, the occurrence at particular times of writers of transcendent talents and learning, or the successive differences in the mode of cultivating the science. Neither in the Maritime department is any convenient division into periods afforded or suggested by the succession of continental treaties. The chief, if not only assistance in our present enquiry, to be derived from these treaties, is, as showing the conventional al-

terations which the Maritime law of nations, especially during war, underwent, by special paction, binding, of course, upon the contracting parties, while such treaties remained, or may still remain in force, but not thereby establishing any general and common consuetudinary law.

We shall, therefore, prefer dividing the long period which has elapsed, from the termination of what have been called the middle ages, into the several successive centuries, subdividing the 18th and 19th into smaller portions,—and in each of these periods, we shall keep in view the two grand divisions of positive international law; the general common consuetudinary law, and the particular conventional.

Under the first grand division our inquiries will embrace, first, reference of course, to the pre-existing collections or records of general Maritime international customs and usages before-mentioned, as having recognized and established in practice, the greater part of the principles and rules of the natural law of nations, and as having also established rules of practice, where such principles may not have been found imperative or applicable. Secondly, the internal legislative enactments, or sovereign ordinances and regulations, and the judicial determinations of the tribunals of the different European and other independent civilized nations, as exhibiting their views and practice of Maritime international law, and as constituting that law at least against these states, upon the incontestable principle of reciprocity. Thirdly, the writings of the respective international jurists of these different nations, as recording such customs and usages, and such statutes or ordinances, and judicial determinations, but chiefly as discussing the principles of natural international law, and recording those principles which have been recognized in the

general observance and practice of nations, and as thus illustrative of the principles both of natural and positive international law.

Under the second grand division our inquiries will, of course, embrace reference to the substance or import of the treaties concluded previously, and during the particular period, between or among the different European nations, so far as remaining in force, as constituting for that period the conventional Maritime international law of Europe, binding upon the contracting parties.

But the object of our inquiries, which was limited at the outset, to the Maritime department of international law, becomes, from the period at which we have now arrived, in a great measure still farther limited, namely, to Maritime international law during war.

For the collections of Maritime customs and usages which we have seen, from their similar, general, and common nature, constituted, to all appearance, during the middle ages, the Maritime international law during peace, of the Maritime commercial states of the Mediterranean, of the Western Ocean, of the North Sea, and the Baltic, were succeeded by the codes, or bodies, or systems of Maritime law, which, after the consolidation of their territories, and the establishment of stronger and more regular governments, the different European kingdoms and states, each separately formed for themselves respectively, in the natural progress of civilization. At the same time, while they succeeded, and so far superseded them, the internal systems of Maritime law, thus formed by the different European kingdoms and states, did not, by any means, annul or annihilate the common and general Maritime usages, which had previously prevailed during peace. On the contrary, in the gradual formation of these separate systems, or bodies of internal, or private Maritime law, these different

states adopted, almost entirely, those previously existing Maritime usages. And there thus continued to prevail, a common and general Maritime law during peace, a law administered to individuals without distinction, whether they were of the same nation or not—a *Jus Maritimum universale*—such as led to its being assimilated to, and frequently confounded with, international law, strictly and properly so called. But as we have already given a pretty full account of this *Jus Maritimum privatum*, in our Historical view of the law of Maritime commerce, we beg leave to refer to it, and will, in surveying the 16th and following centuries, merely notice cursorily some of the more important rules subsequently adopted, or observed, by the different European nations, for the regulation of their Maritime intercourse during peace, with foreigners, particularly with regard to commercial transactions; and confine our larger details to Maritime international law during war.

Referring, then, to the records of Maritime international customs and usages before-mentioned, as constituting the general common consuetudinary, and to the treaties before specified, as constituting the particular conventional Maritime international law of Europe, at the commencement of the 16th century, we proceed to trace the progress of these two distinct branches of the law in the course of that century, as appearing, the first from the internal institutions, statutes, ordinances, and judicial determinations and practice of the different European states, and from the works of their respective international jurists; and the second, as appearing from the treaties concluded between or among these states.

SECTION II.

General and Common Positive International Maritime law during the 16th century, as appearing from the internal Institutions of Nations, Statutes, Ordinances, and Judicial determinations.

SPAIN.

PASSING from the Maritime states of the Mediterranean during the middle ages, or from the 12th to the 15th century, inclusive, to the Peninsula, as containing the westmost and next earliest civilized of the European kingdoms, we find that the Maritime international law of Spain during peace, consisted, during the 16th century, partly of some local statutes and government regulations, but chiefly of the rules and usages contained in the Consolato del Mare; which code we found reason, in our Historical view of the law of Maritime commerce, to conclude with Don Antonio Capmany, and M. Pardessus, was actually compiled in Barcelona. Liberty of entrance, residence, and commercial dealings, appears to have been early allowed to foreigners, in the sea-ports, particularly in those of Catalonia, formerly so flourishing in trade, and in those of the comparatively free and commercial province of Biscay. Even so early as 1266, certain laws, contained in las Siete Partidas, regulated the Maritime trade of the coasts and ports of Leon and Castile, and allowed foreigners when in Spain, to make their testaments, and transmit their heritage to foreigners. The Jus Naufragii was either never exercised by the christian kings of Spain, or was early abolished by the laws of the 13th century, such as the Consolato del Mare, or the laws de las Siete Partidas,

of Alphonso X. The Droit d' Aubaine was never exercised in Spain, except by way of retorsion. The establishment of the Inquisition, in the 15th and 16th centuries, presented an obstacle to the residence of foreigners, not of the Roman Catholic religion; but this came to be regulated by treaties. In 1549, a law was passed, regulating the form and language in which merchants were to keep their books. In 1593, the king issued, and in 1599, confirmed a proclamation, bearing, that all foreign merchants coming into Spain, should enjoy entire safety and protection for themselves and their merchandise. Several provinces, particularly Catalonia and the Balearic Isles, carried on, during the middle ages, an active and extensive trade in the Mediterranean and Levant, until Arragon and Castile were united; and from being associated in the extravagant hopes and projects to which the discovery of the new world gave birth, were involved in those destructive wars waged by their Austrian sovereigns. Spain also possessed the Canaries, and was becoming more acquainted with the western coast of Africa, when Columbus made for her the more splendid discovery just alluded to. From 1533 at least, Spain excluded all Europeans from entrance into, or commercial intercourse with, her colonial possessions in America and Asia. And this prohibition frequently repeated, has suffered few exceptions.*

With regard to Maritime international law during war, a general law in 1593, under Philip II. enacted, that, in case of a rupture, foreign merchants should have three months time to retire. Even from the 13th century, we find laws which regulated privateering or prize expeditions, both in the ports of Arragon, and in those of Castile. According to these laws, the goods of the

* Martens Cours Diplomatique. Tom. III. Liv. II. chap. I.

enemy were held liable to seizure, though on board neutral vessels; and we shall find the same doctrine continued during the following century, when we come to derive our information from El Caballero d' Abreu.

FRANCE.

The reception of the Spanish emigrants who fled from the Moors, the great fairs, particularly those of Champagne, which were in a very flourishing state in the 12th century, and the commercial privileges granted to the Lombards in the 13th century, paved the way for, and facilitated the introduction of the general liberty of entrance into, and residence in the kingdom, which for upwards of two centuries, France has granted to the subjects of all friendly nations. The barbarous *Droit de Naufrage* was partially repressed from 1226 by the *Rôles d' Oleron*, and more generally and effectually by the edict of 1543, and the ordinance of 1568. The iniquitous *Droit d' Aubaine* was for a long time only partially abolished by grants of privileges, and various treaties. The edict of Nantes in 1598, established religious toleration to a certain extent. Foreigners, equally with natives, were placed under the protection of the state, and were subjected to the laws and courts of justice. Consular jurisdictions for commercial affairs were established in 1563. But commerce still languished under the multitude of customs, duties, and other national and local taxations, which from 1352, had been formed into a system. External navigation and commerce, during the 16th century, was still confined to the coasting trade and the Mediterranean.*

The Maritime international law during war, observed and administered by France, during the 16th century,

* Martens Cours Diplomatique. Tom. III. Liv. I. chap. I. 2 Coll. Marit. 105.

seems, with two important exceptions, to have been pretty much the same, as that which appears from the *Consolato del Mare*, and the treaties, and other state documents before noticed, to have been practised by the Maritime states of the south and north of Europe, during the previous centuries. And as Sir Chr. Robinson observes, "the Regulations of the French code form an important object, in the general system of prize law, on account of the great part which that nation has always taken in the affairs of Europe. They are worthy of attention, also, as being, in many instances, but declaratory of general principles, which have been incorporated into temporary edicts, from the usages and customs of the sea. So far, they are good evidence of such usages. They are still farther worthy of attention, as having taken the lead in establishing some innovations, which, being more rigorous than the old system, have helped to provoke pretensions, on the part of neutral nations, to be relieved from the legitimate obligations of the old system altogether."

The chief French ordonnances, during the 16th century, are those of 1517, 1543, and 1584.* The vessels, and cargoes of vessels, belonging to the enemy, were, from time immemorial, deemed lawful prize, whether captured by national or government ships of war, or by privateers; provided the latter had obtained letters of marque, or were duly authorized by the sovereign. Great encouragement was held out to privateers, or *Armemens en Course*. During war every vessel was held suspected.†

By the ordinance of 1584, all vessels, French, allied, or neutral, were held bound to obey, or comply with,

* Coll. Marit. 105.

† For the detail respecting France, see Valin, *Traité des Prises*.

the summons, (Semence) visitation and search, by a national or government ship of war, or privateer, if furnished with a regular commission; and by the same ordonnance, a neutral vessel which obeyed the summons, and whose papers were found correct, was directed to be forthwith released.

By the ordonnances of 1543 and 1584, vessels with their cargoes, were held good prize, whose masters or crews had thrown into the sea, the charter party, bills of lading, or other usual ship's papers, or on board of which there were found no such charter parties, bills of lading, or other ordinary ship's papers.

The older ordonnances do not appear to have confiscated neutral goods on board neutral vessels, on account of their carrying hostile goods. But the ordonnance of 1543, apparently for the first time, and afterwards the ordonnance of 1584, declared the goods of a friend in an enemy's ship, and the ship of a friend having enemy's goods on board, subject to condemnation. This was a direct departure from the old practice, as recorded in the *Consolato del Mare*. And this innovation is stated to have become necessary, for the purpose of encouraging French cruizers, and relieving them from the difficulties which they had to encounter, in consequence of concealed interests, and fraudulent claims. Whether, and how far this provision of these ordonnances was strictly enforced, we shall have an opportunity of enquiring, when we come to the 17th century.

By the ordonnances of 1543 and 1584, warlike stores or goods, contraband of war, were held liable to confiscation.

The same rules were to be observed in re-captures as in captures. By the ordonnance of 1584, a French vessel captured by the enemy, and re-captured either by the king's vessels, or by duly authorized privateers, after

the vessel had been twenty-four hours in the enemy's possession, was held a good prize, and went entirely to the profit of the re-captor; but, if re-captured before the lapse of twenty-four hours, was held to belong to the re-captor, only to the extent of a third; the other two thirds reverting to the former owner.

In the practice of the 16th century, it rather appears a French vessel re-captured from pirates, could not be reclaimed by the original owner. But this practice seems to have been altered during the following century.

The ordonnances of 1543 and of 1584, enjoined the seizure and preservation by the captors, whether national ships of war or privateers, of all licenses, passports, charter-parties, bills of lading, and all other sea or ship's papers, concerning the loading and destination of the vessel. The same ordonnances enjoined the owners and captains of privateers, to bring or send the prize, with the prisoners, to the port where they were fitted out, under the penalty of forfeiture of their right, and a discretionary fine; unless forced by stress of weather, or dread of the enemy, to resort to some other port; in which case, they were declared bound immediately to give intimation to the parties interested. The same ordonnances prohibited, under the pain of death, or other severe punishment, all acts of concealment of the prize, by sinking, burning, or otherwise.

The more ancient ordonnances contain no traces of the practice of ransom from the enemy. Any notices of ransom relate to capture by pirates. The ordonnances of 1517, 1543, and 1584, all prohibit, under fine and corporal punishment, all concealment, pillaging, removal, intermeddling with, sale or other disposal of the captured goods, until the prize has been adjudged.

According to the ordonnances of 1527 and 1584, as well as that of 1400, the officers of the admiralty had

not only the preparatory judicial process as they had in 1763; they had also the right of adjudicating the prizes in the first instance, under the reservation of an appeal to the Conseil d'Etat. In the course of the 16th century, the owners of the privateer were held entitled to demand delivery of the captured vessel and its cargo in specie; unless they consented to a public sale thereof, by the officers of the admiralty. Subsequently, a judicial sale of the vessel and cargo became the uniform rule in practice.*

In the course of the 16th century, the capture of vessels and cargoes as lawful prize, by way of reprisals, appears also to have been in practice in France;—the right of reprisals being the right which every sovereign of an independent state has himself, and may delegate to his subjects, of obtaining justice for himself or his subjects, for wrongs which have been done to him or them, by another sovereign or his subjects, and for which satisfaction has not been given, by seizing such goods as may be found to belong to the subjects of that other sovereign, in order to enforce indemnity for the loss sustained.

NETHERLANDS, BALTIC, &C.

During the 16th century, the chief, if not the only Maritime international law during peace, which we find in the Netherlands, appears to have been those common Maritime usages, which may have been partly derived from the Mediterranean states, in consequence of the great intercourse between them and Flanders, but which seem chiefly to have originated on the western coasts of Europe, and from imitation, to have travelled northward along the northern coasts of Europe to the Baltic.

* See Valin, *Traité des Prises*.

Of those early usages we gave some account, in our Historical view of the law of Maritime commerce; as also of the edicts or ordinances of the Burgundian and Austrian sovereigns of the Netherlands. With regard, again, to Maritime international law during war, we do not find, during the 16th century, any rules different from those observed by the Maritime states of the Mediterranean. Indeed, during that century, the Dutch prize law appears to have been more mild and equitable than that of France, inasmuch as it did not confiscate neutral goods, although found on board hostile vessels. For Grotius informs us, that a judgment to this effect was pronounced by the senate of Holland in 1338, perhaps 1438, and that this judgment was afterwards adopted as law. *Atque ita, in Hollandiâ nostrâ jam olim, anno scilicet 1338, (1438), flagrante cum Anseaticis bello, frequenti Senatu judicatum; et ex judicato, in legem transiisse, comperi.* And although he had not been able to find any record of this decision, Bynkershoek has no doubt of the fact. *Quaest. Jur. Pub. Lib. I. cap. XIII.* During this century, too, the same rules appear to have been observed in the North Sea and the Baltic; with the exception, perhaps, of the Hanse towns, who endeavoured to enforce their favourite mercantile maxim of "free ship, free goods," while they had the power to do so, but at the same time, denied the benefit of that maxim to other nations.

ENGLAND.

In England, during the 16th century, the Maritime international law during peace, consisted chiefly of those general and common usages which prevailed in the west and north, as well as in the south of Europe, as recorded in the *Rôles d'Oleron*, and in the *Black Book of the Admiralty*. And of these we have elsewhere given a

sufficiently long account. The liberty of entry, residence in the kingdom, and departure, was secured to foreigners by the Magna Charta. And in 1328, their rights were defined by the Charta Mercatoria. The Jus Naufragii was first restricted, and afterwards totally abolished, in 1333. The Droit d' Aubaine does not appear to have ever been exercised in England, except by way of re-torsion. From the time England acquired possessions abroad, and founded colonies, she prohibited foreigners from establishing themselves there for the purpose of carrying on trade, or acting as factors. She confined the colonies to commerce with the mother country alone; and permitted only a limited commerce between them and other nations out of Europe.*

With regard to Maritime international law during war, England in the 16th century, appears to have continued to observe the same rules and usages as those observed during the three preceding centuries, and as those observed in the Mediterranean, Western Ocean, and North Sea; capturing as prize the goods of the enemy at sea, though in neutral vessels, and also warlike stores, or contraband of war, though belonging to neutrals, but allowing other innocent neutral goods, though on board hostile vessels, to pass free.

From the instructions given by king Henry VIII. to the admiral, in 1512, respecting the discipline of the fleet in the expedition against the French king, it appears England then exercised the right of visitation and search; held resistance by the neutral vessel to be a ground for condemnation as prize; and treated prize matters generally, secundum Jus Maritimum, selon la Loi, et costumes de la Mer.†

* Martens, Cours Diplomatique. Tom. III. Liv. IV. chap. I.

† Collectanea Maritima, by Sir Chr. Robinson, 1801, p. 1—20. Rym. Fœd. vol. XIII. p. 229.

In 1521, there occurs a stipulation or declaration in favour of England, in a capitulation between Francis I. and Charles V. through the mediation of Cardinal Wolsey. But this declaration does not appear to have given any permanent extension to the ordinary local Maritime jurisdiction of England, in relation to neutral vessels, or to have been founded on by England, or to have been admitted by France, as conferring any exemption from search for enemy's property, as contraband of war.*

“ In the journal of Edward VI. (observes Sir Chr. Robinson), published by Burnet, in his history of the Reformation, it appears, that in consequence of some captures and condemnations of English vessels, remonstrances were made to the French court; redress was insisted on, not as matter of favour, but according to the established rules of law, actually understood and practised between the two nations. The French government offered to restore the property, as matter of favour; but were anxious to enforce the principles of some new law which they had lately laid down. King Edward's answer to these solicitations, is thus recorded in his journal, Oct. 8, 1551. Le Seigneur de Villandry came in post from the French king with this message: first, that although Mr. Sidney's and Mr. Winter's matters were justly condemned, yet the French king, because they both were my servants, and one of them about my person, was content gratuito, to give Mr. Sidney his ship, and all the goods in her, and Mr. Winter his ship, and all his own goods; which offer was refused, saying, we required nothing gratuito, but only justice and expedition. Also, Villandry declared that the king, his master, wished that an agreement were made between the ordonnances and the customs of England and France,

* Coll. Marit. p. 41, 42.

in marine matters. To which was answered, that our ordinances were nothing but the civil law, and certain very old additions of the realm: that we thought it reason not to be bound to any other laws, than the old laws, which had been of long time continued, and no fault found with them." France was at that time engaged in a war with the German emperor, in Flanders and in Italy, into which king Edward had declined to enter. And it is very probable, the innovation which occasioned these remonstrances, was the rule introduced about that time, by the Ord. of 1543, and continued by the Ord. of 1584, of making the neutral ship subject to condemnation, for having enemy's property on board.*

In the latter part of the 16th century, Queen Elizabeth of England had two disputes, one with the Dutch in 1575, and another with the Hanse towns in 1598. And as that princess has, on these occasions, been erroneously represented by the continental writers, Hübner and Schlegel, as maintaining rules of the law of nations, inconsistent with each other—as maintaining the right of search on the one occasion, and denying it on the other, it may be proper to state how the fact really stands, as ascertained by Sir Chr. Robinson.

The question with the Dutch in 1575 was, whether neutral English ships should be confiscated for having enemy's goods on board; namely, the goods of Spaniards, with whom the Dutch were then at war; and the dispute was settled by the confiscation of the enemy's goods, and the restitution of the captured neutral vessels, agreeably to the ordinary rule.

The question between Elizabeth and the Hanse towns in 1598, was quite different. And the argument maintained by her in her answer to these confederated states

* Coll. Marit. p. 105, 6, 7.

was, her right to confiscate the warlike stores, including grain, which the Hanseatic merchants were, notwithstanding previous intimation, carrying to Spain, to assist in enabling king Philip to accomplish his threatened invasion of England.*

SECTION III.

General and Common Positive International Maritime law during the 16th century, as appearing from the writings of International Jurists.

So much for the international Maritime law of the 16th century, (partly in peace, but chiefly during war), as appearing from internal institutions, sovereign ordinances and proclamations, and the judicial determination of some important questions. But, as formerly observed, it was in the course of the 16th century, that international law, and particularly the Maritime department of that science, came first in modern times, to be expounded by jurists, in treatises, devoted chiefly, if not entirely, to that subject. And, as formerly observed, we thus come to have, from this period, what may be viewed as an additional source of the law of nations. For the works of jurists, which now begin to appear, are valuable, not only as affording a better arranged record of the substance of treaties, or of the conventional law of nations, and likewise of the common or consuetudinary law of nations, as exhibited in the enactments, ordinances, or proclamations, by the governments of particular states, but also, and what is perhaps of greater importance, as containing a learned, and frequently acute and

* Coll. Marit. p. 141, 142.

scientific investigation, elucidation and development of the natural juridical relations of nations, as the true foundation of the positive law, particularly of the general common consuetudinary law of nations.

In investigating historically, how international law generally, had been cultivated as a science, we had occasion to notice the first writers in modern Europe, who began to treat of that department of law, such as Vasquez, Suarez, and particularly Albericus Gentilis. The last mentioned author was the first who treated professedly and exclusively of the laws of war, in his work, entitled, *De Jure Belli, Libri tres*, dedicated to the Earl of Essex, published at Oxford in 1588, and reprinted at Hanover in 1598. But beside those passages in his great work, *De Jure Belli*, which relate to the Maritime law of nations, and which have given so much offence to the advocates of neutral trade in more recent times, although in these, the author had no other demerit, than recording and justifying the long established customs and recognized rules of the times in which he lived, Gentilis discussed also a number of the doctrines of Maritime international law, in his minor work, entitled, *Hispanicae Advocationis Libri duo*, published after his death, by his brother Scipio Gentilis, in 1613, and reprinted at Amsterdam in 1661. After the accession of James to the English throne, and the restoration of peace between England and Spain, Albericus Gentilis appears to have been employed to assist in the adjudication of various important questions of Maritime international law, which arose between the inhabitants of Spain and of the united provinces of Holland. And if in his *Hispanica Advocatio*, as in his greater work, he rests too much upon the law of the Romans, if he sometimes appeals to authorities, not of the first class, and is not always quite consistent in his arguments, it may be

pleaded as an excuse for him, that, like many of the more recent writers on the law of neutral trade, during war, he was frequently called upon rather to discharge the functions of an advocate for a party, than of an impartial judge. At all events, it cannot be denied, that he reasoned very acutely, and in various important particulars, recorded correctly the rules of Maritime international law observed in practice, previous to, and in, his own times.

In the first book of his great work, *De Jure Belli*, cap. 21, *De Malefactis Privatorum*, on the misdeeds or illegal acts of private individuals, citizens or subjects, as binding the nation, and as a just cause of war, Gentilis distinguishes between such acts as are merely momentary, and those which are repeated, continued, and successive. And under the latter, as alone binding the nation, and constituting a just cause of war, he thus lays down the general principles which regulate the leading questions between belligerents and neutrals, with regard to the Maritime trade of the latter, during war, namely, the questions of seizure of enemy's property, of contraband of war, of blockade, of the right of search, of the neutral vessel or flag, covering or not covering a hostile cargo.

* “*Etiam illud traditum est, non modo laedi Publicum foedus, si expresse neget universitas, laesis satisfacere*

* It is also handed down to us as doctrine, not only that the public league or law of nations is violated, if the *universitas*, the nation in its corporate capacity, expressly refuses to satisfy the injured individuals, but also, if for a long time it shall suffer the injury to be done, although from the beginning there may have been no deliberate concert. Thus, truly, they conclude that the state is bound for the delinquencies of its citizens, which are not momentary, but successive and continued; this, however, if it both knew and might have prohibited: as successive delinquencies, it appears, may be prohibited by a powerful state, because there is abundance of time. Shall I call the delinquencies successive or not? Certainly those are successive, which,

sed etiam, si longo tempore feret, injuriam fieri, licet a principio nulla fuerit communis deliberatio. Sic sane

to the great danger and detriment of the English realm, certain individuals of the united provinces of the Netherlands, endeavour to accomplish, that they may carry to the Spaniards provisions, and other articles, which are usually of service in war; even proceed to do so, though requested to desist; nay, even desire such a request may not be made, as being contrary to the *Jus Gentium* and the liberty of commerce. An important question; strict law being for them on the one side, and on the other, equity being for the English. But who is ignorant that in all things, the chief regard is to be paid to justice and equity, rather than to strict law; that the rule of equity is to be preferred to the *Jus strictum*, the meaning and spirit to the written expression; that *Jus* is *Bonum et Aequum*, but that there is a more equitable, than equitable, a more favourable, than favourable, a more useful, than useful, (in other words), that there are degrees in equity, in what is favourable, and in utility. The former, (the Dutch,) are unwilling to lose the profit of their commerce. The English are unwilling that anything should be done inconsistent with their safety. The right of commerce is equitable; but the right of self-preservation of maintaining the safety of the state, is more equitable; the former is the *Jus Gentium*; the latter is the *Jus naturæ*; the former is the right of private individuals; the latter the right of independent states or realms. Let commerce, therefore, yield to the state; man to nature: money to life. These are the reasons for solving the questions, arising from the conflict or collisions of laws, that the preference should be given to the more worthy, the more useful, and the more equitable law; that the profane should yield to the sacred; that what regards the body, should yield to what regards the mind or soul; that what regards wealth or fortune, should yield to what regards the body; that a statute, which may even contain what is equitable and just, should yield to natural law; that a person maintaining the defence of foreigners should yield to the person maintaining the defence of his fellow-countrymen or relatives; that a person pursuing his private interest, should yield to a person pursuing the public good; the rigorous to the equitable, the unnecessary to the necessary, the permission to the command or prohibition, the new to the old, the privileged cause to the more privileged, &c. This is the reason, in a state, why men frequently cannot do with their own what they would wish, in order that the public welfare may not suffer, that nothing inequitable may result to other private individuals. And here is the foundation

concludunt, Civitatem teneri pro delictis civium, non momentaneis, sed successivis, continuatis; et hoc, tamen, si et scivit, et potuit prohibere; ut prohiberi successiva posse videntur a Civitate potenti, quia tempus supersit. Successiva, dicam delicta, an non? Successiva certe ea sunt, quae cum periculo magno, ac detrimento Regni Angliae, Foederatorum qui facere tentant, alii, ut ad Hispanos deferant commeatum, et quod in bello usui esse solet; etiam facere pergunt, rogati ne faciant; etiam petunt, ne rem istam rogentur; quae contra Jus Gentium, et Commerciorum libertatem est. Magna quaestio; hinc jure stricto, pro his; illinc stante pro Anglis aequitate. Sed quis, tamen, nescit, in omnibus rebus praecipuam esse Justitiae aequitatis quae, quam stricti Juris, rationem; Legem aequitatis Juri antestare stricto; sententiam scripto? Bonum et aequum esse Jus: Esse, autem, aequo aequius, et favorabili favorabilius, et utili utilius: Lucrum illi Commerciorum sibi perire nolunt. Angli nolunt, quid fieri, quod contra salutem suam est. Jus Commerciorum aequum est; at hoc aequius, tuendae salutis; est illud Gentium Jus; hoc Naturae est; est illud Privatorum; est hoc regnorum. Cedat igitur regno, mercatura, homo naturae, pecunia vitae. Istae sunt rationes solvendi Legum pugnas, ut digniori, utiliori, aequiori cedatur legi; ut sacrae cedatur a profanâ; spectanti animam a spectante corpus; spectanti corpus, a spectante fortunas; juri naturali a lege, quae etiam aequum contineat, et jus naturale; statuenti tuitionem

and effect of the public interest in civil societies, over the whole earth. We may here be reminded, although it is sufficiently plain, that we observe, when we wish to satisfy, we urge, as far as we can, as an excuse towards others whom we are unwilling to offend, that it is necessary for us to do what we do, and that we could not do otherwise; and that by other services and good offices, compensation will be made for what we have violated.

suorum, a statuyente tuitionem alienorum; habenti bonum publicum, ab habente privatum; aquae a rigorosâ; necessarii casus a non tali; praecipienti et vetanti a permittenti; veteri a nova; privilegeatae causae magis, &c. Haec in Civitate est ratio, cur de suo saepe facere nequeant homines, quod vellent, ne quid Respublica caperet detrimenti, ne quid etiam non aequi in alios privatos rediret. Et hic ratio publicae rei est, publicae partis Orbis. Hic tantum illud sumus admonendi, etsi in promptu est, ut animadvertamus, quum juvare volumus, nos uti excusatione, adversus alios, quos inviti offendimus, quacunque possumus, quare, id quod facimus, necesse sit, nec aliter facere possimus; caeterisque operis et officiis futurum, quod violaverimus, compensandum.

In the preceding passages, Gentilis, though in the quaint style of his age, points out the conflict and collision of the rights of belligerents and neutrals, and the foundation of their respective rights, more acutely than many of the subsequent writers on the law of nations. But so great has the collision proved, in the course of ages, between these antagonist rights, and so strong the interest and zeal of the adverse parties, in the support of their respective claims, that Lampredi observes, were Albericus Gentilis to return to life, he would find the question which appeared to him grave and difficult, just where he left it, though solved in reason, still unsettled in practice, after the lapse of from two hundred to three hundred years.

In his posthumous work before mentioned, *Hispanicae Advocationis Libri duo*, Gentilis also states pretty fully, particularly in the first book, the leading rules of the Maritime law of nations, as then observed between belligerents, and between belligerents and neutrals. And it may be proper here to notice, historically, some of the usages then prevalent. Thus, vessels and goods,

though placed in such a condition that they will, in all probability, be captured, were not held to have been acquired by the enemy. And with regard to things captured, becoming the property of the enemy, all were agreed they must be previously brought into a place of safety; some held they must remain for a night or twenty-four hours in the possession of the enemy, before the property was transferred; but the sounder opinion and practice seemed to be, that time was irrelevant, and had nothing to do with the question; and that the property did not pass until the captured effects were brought *infra Praesidia*, of the captor, namely, the *stationes navium*, the harbours or ports of his own country. No length of possession at sea was held to transfer. Whether goods captured belong to the enemy; and whether, when re-captured, they ought to be restored to the former owner, are two different questions. Lib. I. c. 2, 3, 4.

All commerce with the enemy is illegal; *Cum hostibus, Jure etiam Communi, vetitum commercium est.* Lib. I. c. 13.

The right of search of merchant neutral vessels by belligerent ships of war, in order to ascertain whether the goods on board belong to an opposed belligerent, is stated as the rule established by custom and usage; though, as an advocate, contested by Gentilis, except on the shores of the belligerent nation; not very consistently with the right of search recognized by him for the purpose of detecting contraband warlike stores. *Non mihi, vel Mos ille, alicubi si sit, obtrudatur nunc, pro Lege Maris, de Imperio isto navium Bellicarum; quoniam admitti ille mos possit, ad Littora Principis navium; in Mari alio, non possit.* Lib. I. c. 27.

The captors of goods belonging to the enemy, on board neutral vessels, are bound to pay the neutral

owners, the stipulated freight which the owners of the captured vessel would have had to pay. Lib I. c. 28.

A privateer belonging to a belligerent state, but manned by a neutral crew, and sailing under the protection of the belligerent nation, cannot make a legal capture of vessels or goods, belonging to the opposed belligerent. Lib. I. c. 10.

The subjects of a belligerent who have taken refuge in the harbour of a neutral state, may be allowed to sail in safety, for the ports of the nearest friendly country. Lib. I. c. 14.

A native of a belligerent country, but whose father has been afterwards naturalized in a neutral country, becomes the subject of the latter government, and cannot, by letters of marque from the government of his original country, support a capture made from the enemies of that country. Lib. I. c. 17.

It was recognised as the general rule, that it is illegal in neutrals to carry warlike stores to either belligerent; but exceptions may arise from special circumstances, as when only a trivial part of the cargo consists of warlike stores, when there is manifestly no intention to aid the belligerent, by affording supplies. Lib. I. c. 20.

In the question whether purchasers of goods captured by a foreign privateer, from foreign purchasers of these goods, in a foreign place, could retain or acquire the property of these goods; it rather appeared they might. Lib. I. c. 23.

That a limited jurisdiction over the sea immediately adjacent to the coasts of each country, is necessary for the security of the nation, and quite justifiable, we have already had occasion to observe. But the extent to which Gentilis claims the marine jurisdiction for England, is absurd; and no such claim has been maintained for centuries. The following is his defence of this claim

to marine territory. Veneti, Genuenses, &c., dicuntur habere jurisdictionem et imperium, in toto Mari sibi propinquo, per centum milliaria, vel etiam ultra, si non propinquant alteri provinciae. Et vides, quam pretendatur Regis nostri imperium, longè in meridiem, septentrionem, occasum; Britanniae septentrionalia, nullis contra terris, vasto, atque aperto mari, pulsantur. Tacit. Agricola. Caesar. V., Hiberniae meridionalia terminantur ad Hispaniam, occidua ad Hispaniae regna Indica. Et sic est in immensum lata jurisdictio Regis nostri marina. And upon this manifestly untenable plea, the captures made by the Dutch from the Spaniards, during the war which then prevailed between these two nations, within the jurisdiction thus claimed, were held to be illegal. Statim, scilicet, ut fuit navis captiva intra hos fines, eadem tuta fuit ab omni vi; statim intelligitur, quae significat ipso jure; et nihil hic esse opus sententiâ judicis.

SECTION IV.

Conventional or particular Maritime International law during the 16th century.

AGREEABLY to the plan proposed in Section I. of this chapter, we should now proceed to consider the conventional Maritime law of nations, during the 16th century; in other words, to mark such alterations as may have been made by special treaty, between particular nations, on the general rules of the common consuetudinary law of nations, as it was otherwise recognized in practice during that century. And the propriety of such separate inquiry will clearly appear, when we come to the 17th century, during the latter part of which, a consid-

erable number of such special treaties were entered into. But during the century we are now surveying, the different Maritime states appear either to have continued to follow the common consuetudinary law previously in practice, or to have adhered to the treaties concluded between them, during the three preceding centuries, which we have already noticed in section II. of chapter IV. at sufficient length; or if, like France, they made any such alterations, to have done so by ordinances for the regulation of the conduct of their own subjects, which, of course, were not legally binding on the subjects of other states, but to which the latter, from inferiority of power, or other causes, might find it prudent or convenient to submit. These separate internal institutions and regulations we have already considered pretty fully in section II. And the following seems to be the result of our investigation.

That during the 16th, as well as during the 13th, 14th, and 15th centuries, according to the general and common usage and practice of the European nations, as well as according to the particular treaties concluded between individual states, the goods of the enemy were held lawful prize, if found on the high seas, though in neutral vessels, if, upon search, ascertained to be such, but under the condition of paying the neutral his freight. That the goods of neutrals were in general held not liable to seizure, though found in hostile vessels; except warlike stores, as contraband, and grain or other provisions, if destined to blockaded ports, or when destined for the ports of the enemy generally, if manifestly intended for his immediate relief, or supply for military purposes and operations.

That by the ordinances of the French and some other governments, and perhaps by some special treaties, the goods of neutrals, though not contraband of war, were

made liable to capture, if found on board hostile vessels, along with hostile goods, and likewise neutral vessels, if found carrying hostile goods. But that the negotiations of the Hanse towns proved ineffectual, and that hitherto no treaty appears to have stipulated, or at least secured, protection for hostile property found on the high seas, on the ground solely of its being carried by, or discovered on board, neutral vessels, either for a definite or indefinite period.

CHAPTER VI.

OF MARITIME INTERNATIONAL LAW, CHIEFLY DURING WAR, IN THE COURSE OF THE SEVENTEENTH CENTURY.

WE have now arrived at the commencement or earlier part of the 17th century—the age of Grotius. And since from this period, the chief records of the general natural consuetudinary, as distinct from the particular conventional Maritime law of nations, are contained in the writings of international jurists, we shall, in the first place, consider these writings, and then along with these writings, the internal legislative enactments, or sovereign ordinances and judicial determinations of the principal Maritime states of Europe, which indicate at least their practice of, and constitute against them, that Maritime law.

In the second place, we shall consider the conventional law of nations during war, as established by special compacts or treaties.

With regard to the law of nations during peace, it continued during the 17th century, to consist very much of those general and common Maritime usages and customs recorded in the *Consolato del Mare*, the *Rôles d' Oleron*, and the *Us et Coutumes de la Mer*, the laws of Amsterdam, the laws of Wisby, and the laws of the Hanse towns, as gradually so far adopted, and so far modified by the different European kingdoms and states,

in their statutes, ordinances, and judicial determinations. And for notices of this Maritime law, which, from the general, common, and similar nature of its rules, has been frequently denominated the law of nations, we may here refer to our Historical view of the law of Maritime commerce; confining our present inquiries, as during the preceding century, chiefly to Maritime international law during war.

SECTION I.

Of the Sea—how far susceptible of appropriation or dominion—how far free for Commercial and other intercourse.

IN a previous chapter, we had occasion to observe, that the following were the chief doctrines of Maritime international law, properly so called. First, the appropriation of a dominion over the sea to a limited extent; on the other hand, the freedom, or legitimate and regulated use of the sea, as a medium of communication, and for the purposes of navigation and commerce. Secondly, the reciprocal rights and obligations of nations, in their intercourse by sea during peace, for commercial purposes, or otherwise. Thirdly, the reciprocal rights and obligations of nations during war, including those of the belligerents in relation to each other, and those of the belligerents and neutrals in relation to each other.

Of these different branches of doctrine, the first appears to have mainly occupied the attention of Maritime states and jurists, during the early part of the 17th century. During the former centuries, Venice had laid claim to the sovereignty of the Adriatic. In 1617, Angelus Mattheacius supported this claim in a work, entitled, *De Jure Venetorum, et Jurisdictione Maris*

Adriatici. In 1618, Cornelio Francipane published a treatise, entitled, *Alegazion in Jure, per il dominio, della Republica Veneta, del suo Golfo, contra alcune Scritture di Napolitani*. In 1619, Franciscus de Inguenis, wrote *Epistola de Jurisdictione Venetae Reipublicae in Mare Adriaticum*; and about the same time, Julius Pacius wrote a treatise, entitled, *De Dominio Maris Adriatici, Disceptatio, inter Regem Hispaniae ob Regnum Neapolitanum, et Rempubicam Venetam*. In 1663, Palatius, in his work, entitled, *Leo Maritimus, sive de Dominio Maris contra Graswinckelium*, maintained the dominion of the Venetians over the Adriatic. And in 1676, Paolo Sarpi wrote a treatise, *Del Dominio del Mare Adriatico della Republica di Venezia*.

Genoa also had laid claim to the bay adjacent to that city, the *Mare Ligusticum*. In 1579, Julius Ferretus had written a treatise *De Belli Aquatici Praeceptis*. In 1641, Burgus, published a treatise *De Dominio Reipublicae Genuensis in Mari Ligustico*; and in 1652, Graswinckel wrote a work, entitled, *Vindiciae adversus Burgum, Ligustici maris Dominio assertorem*.

After the discovery and conquest of South America, the Spaniards claimed an exclusive dominion over the seas adjacent to that continent and the intermediate ocean, which Queen Elizabeth of England successfully resisted. And after their discovery of the passage by the Cape of Good-Hope, the Portuguese likewise claimed an exclusive dominion over the Indian Seas. But this claim also, the Dutch united provinces resisted; and in 1609 and 1611, Grotius distinguished himself, even at an early age, by the publication of his work, entitled, *Mare Liberum, seu de Jure quod Batavis competit, ad Indica Commercia*. In this work, Grotius ably and successfully maintained the lawful claim of the Dutch, to the free use of the Indian Seas, for the purposes of

navigation and commerce, against the attempt of the Portuguese to exclude them; and called forth, on the other side, the likewise able treatises of De Freitas in 1625, *De justo imperio Lusitanorum Asiatico, adversus Grotii Mare Liberum*. This early work of Grotius also elicited, in the other side, in 1635, the celebrated work of Selden, entitled, *Mare Clausum, sive De Dominio Maris, Libri II. Primo, Mare ex Jure Naturae, sive Gentium, omnium hominum non esse commune, sed dominii privati, sive proprietatis, capax, pariter ac tellurem, esse, demonstratur; Secundo, Serenissimum, Magnae Britanniae Regem, maris circumflui, ut individuae atque perpetuae, Imperii Britannici appendicis, dominum esse, asseritur*.

In 1637, Gothofredus, the French lawyer, in a treatise *de Imperio Maris*, like Selden, maintained the sea is capable of appropriation. And during the same year, Pontanus, a Dane, in his *Discussiones Historicae de Mari libero, adversus Joannem Seldenum*, maintained the right of the crown of Denmark and Norway to a part of the North Sea, against the pretensions of Selden.

In 1651, there was published, "The sovereignty of the British Seas in the year 1633, proved by records, history, and the municipal laws of the kingdom, by Sir John Borroughs, keeper of the records in the Tower of London." In 1653, Wm. Willwood, in his treatise *De Dominio Maris, juriisque, praecipue ad dominium spectantibus*, strenuously supported the dominion of England over the sea. And these works appear to have called forth, on the other side, during the same year, the treatise of Graswinckel, entitled, *Vindictio Maris Liberi, adversus Guil. Wellvodum, Britannici Maris Dominii assertorem*; to which last work, Selden replied in his *Vindiciae Maris Clausi, contra Graswinckelium*.

In 1654, Shoockius, in his *Jus et Imperium Maritimum*,

treated of the necessity of dominion over the sea, and of the states which had previously held that dominion; and concluded that at the time he wrote, such dominion belonged to the Dutch. In 1656, on the other hand, Henr. Bœclerus, in his *Dissertatio de Minoe, Maris Domino*, maintained the freedom of the sea in general, without reference to any particular states.

With regard to the Baltic, there appeared in 1638 and 1639, the *Mare Balticum* and the *Ante-Mare Balticum*, scilicet, an ad Reges Daniae, an ad Reges Poloniae, pertineat. With respect to the Mediterranean, Conringius in 1670, published *Consilium de Maris Mediterranei dominio, et Commerciis, Regi Christianissimo, vindicandis*; and in his *Dissertatio de imperio Maris*, in 1676, he denies generally, the freedom of the seas.

In 1685, Leickherr, in his *Commentatio de jure Maritimo*, distinguishes well the ideas comprehended under the term dominion over the sea. And in his *Dissertatio De Dominio Maris*, which did not appear till 1703, the able jurist, Van Bynkershoek, ascribed the dominion of the sea to the Dutch and English jointly.

From the preceding enumeration of treatises, it appears that the discussion of the question respecting the exclusive occupation, or the general free use of the sea, commenced by Grotius, about the beginning of the 17th century, was continued with keenness on both sides, till towards the close of that century, among the Maritime states of Europe; the jurists of each state, in general, maintaining that side of the question in which their own country was most interested. The discussion, however, of this long contested question, ultimately led to the adoption of what appears to be the sound view of the subject; namely, that certain seas enclosed, or nearly enclosed within the territories of a nation, and parts or portions of the sea, nay, even of the oceans

adjacent to, and within a short distance of, the sea-coasts of each country, are susceptible, if not of appropriation, at least of dominion and jurisdiction; and that the high or open seas, or oceans, are free for the navigation and commercial intercourse of all nations, subject to such regulations as that intercourse, chiefly during war, may render necessary.

SECTION II.

Of the writers on Maritime International law during the 17th Century.

To return to the commencement of the 17th century, and to Grotius. Of his great work, *de Jure Belli et Pacis*, we have already given a pretty full account in our inquiries in international law generally. Only a small part of it relates to Maritime international law, properly so called. And while he acknowledges, as well as Albericus Gentilis, the difficulty of the questions which arise between Maritime belligerent and neutral nations, he does not enter into any detailed discussion of them; not having found, as he says, in the history of the nations which had preceded, examples on which he could found a rule of general convention, such as to serve as a guide for future conduct. Thus, **Sed et quaestio incidere solet, quid liceat, in eos, qui hostes*

* But here incidentally the question also occurs, what is lawful against those who are not enemies, or do not wish to be called such, but supply the enemy with goods. For both long ago, and lately, we know that question has been keenly contested; when some defended the rigour of war, others the liberty of commerce. But this question we have referred to the law of nature; because we could not find from history, that anything had been established with regard to that matter, by the voluntary (positive) law of nations.

non sunt, aut dici nolunt, sed hostibus res aliquas subministrant. Nam, et olim, et nuper, de eâ re, acriter certatum, scimus, cum, alii, Belli rigorem, alii Commerciorum libertatem, defenderent.* Hanc autem quaestionem, ad Jus naturae, ideo, retulimus, quia ex historiis, nihil comperire potuimus, eâ de re, jure voluntaris Gentium esse constitutum.

Nevertheless, in Lib. III. cap. VI. § 5. and Lib. III. c. XVII. § 1, § 3, Grotius has expounded principles, and made distinctions, regarding the reciprocal intercourse of belligerent states, and the commerce of neutral with belligerent nations, which have been, more or less, followed by all subsequent jurists. Indeed, the passages just referred to, merit particular attention, as containing in fact, the whole substance of his doctrine in this department, which is evidently the result of his mature reflection, though not so much developed as could have been wished. And the conclusions, in point of legal principle, at which his acute and sound, as well as highly cultivated, intellect arrived, correspond almost entirely with the consuetudinary doctrine recorded in the *Consolato del Mare*, as that which experience had taught states and practical men, engaged in Maritime commerce, to adopt.

While, on the one hand, he states the grounds on which the property of the enemy is liable to capture, such as their vessels and cargoes, when found on the open or high seas, out of the territory and jurisdiction of any other nation, and their goods, though found on board neutral vessels, subject to the condition of paying the neutral the stipulated freight for such goods, he distinctly holds, on the other hand, that the goods of neutrals are not liable to capture, though found on board the vessels of the enemy. And he farther explains, that as nations

* Lib. III. cap. I. § V.

at peace are not entitled to do anything, by which the one belligerent may become stronger than the other, it is necessary to distinguish the things which are directly subservient to the purposes of war, such as arms, in the most extensive signification of the term; those things which, from their nature, cannot be of any use in war, namely, such as contribute merely to pleasure or enjoyment; and those things which may serve equally for the purposes of peace or war, such as provisions, money, ships and naval stores; that the neutral cannot, by any means, supply the enemy with the first description of things, without violating the peace, or neutrality; that the commerce of the second description is held free; and that the third may be supplied, according to circumstances; because, if commerce in them with one of the belligerent parties, may occasion actual damage to the other, or interrupt some military operation, the latter party may take possession of the goods, and, according to circumstances, appropriate them, or retain them, or pay their price, according as the supply of them has been, or has not been, culpable.

Thus, * *Liquet et hoc, ut res aliqua nostra Belli Jure fiat, requiri ut hostium fuerit; nam quae res, apud hostes quidem sunt, puta in oppidis eorum, aut intra*

* This also is clear. In order that a thing may become our property by the laws of war, it is requisite that it have belonged to an enemy. For such things as are found with the enemy, in their towns, or within their territory, but of which the owners are neither the subjects of the hostile state, nor of hostile disposition, cannot be acquired. Wherefore, what is usually said, that goods found in hostile vessels are the goods of the enemy, is not to be received, as if it were a certain rule of the law of nations, but only as indicating a presumption, which may be done away, by strong evidence to the contrary. Such things as do not belong to the enemy, although they may be found with the enemy, do not become the property of the captors; for, as we have said before, this would neither be consistent with natural law, nor has it been introduced or established by the law of nations.

praesidia, sed quorum domini nec hostium sint subditi, nec hostilis animi, eae (res) bello adquiri non possunt. Quare, quod dici solet, hostiles censi res in hostium navibus repertas, non ita accipi debet, quasi certa sit Juris Gentium lex, sed ut praesumptionem quandam indicet; quae tamen, validis in contrariam probationibus, possit elidi. Quae vero res hostium, non sunt, etsi apud hostes reperiantur, capientium non fiunt; id enim, ut jam ante diximus, nec naturali juri congruit, nec Jure Gentium introductum est. Lib. III. Cap. VI. § 5, § 6, § 26.

Farther, *Primum distinguendum, inter Res ipsas. Sunt enim, quae in bello tantum, usum habent, ut arma; sunt quae in bello nullum habent usum, ut quae voluptati inserviunt; sunt quae, et in bello, et extra bellum, usum habent, ut pecuniae, commeatus, et naves, et quae navibus adsunt. In primo genere, verum est, in hostium esse partibus, qui, ad bellum necessaria, hosti administrat. Secundum genus querelam non habet. In tertio illo genere, usus ancipitis, distinguendus est belli status. Nam si tueri me non possum, nisi quae mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit; sed sub onere restitutionis, nisi causa alia accedat. Lib. III. cap. I. § 5.

In this last passage, Grotius holds, that the necessity

* In the first place, the things themselves are to be distinguished. For some things are of use in war only, as arms; some things are of no use in war, as articles of enjoyment or luxury; other things are of use, both in war and out of it, as money, provisions, ships and naval stores. Whoever supplies the first description of goods, is to be held as having taken the part of the enemy. To the supply of the second description of goods no complaint attaches. In the third description of doubtful use, the state of the war is to be distinguished; for, if I cannot defend myself, without interrupting the goods in their passage to the enemy, necessity, as we have elsewhere explained, will give the right, but under the burden of restitution, unless another reason occur.

of defence will justify the interception by one belligerent, even of goods of a doubtful description, such as money, provisions, ships, or naval stores, destined by neutrals for the opposite belligerent. And from the following passage, he does not appear to recognize any absolute neutrality, when an obviously unjust war takes place, but only where the rights of the contending parties appear doubtful or uncertain. *Quod si praeterea evidentissima sit, hostis mei in me injustitia; et ille, (the neutral) eum in Bello iniquissimo confirmet, jam non tantum civiliter tenebitur de damno, sed et criminaliter, ut is qui judici imminenti reum manifestum eximit; atque eo nomine licebit in eum statuere, quod delicto convenit, secundum ea, quae de poenis diximus; quare intra eum modum, etiam spoliari poterit, Lib. III. cap. I. § V. 3.*

Grotius thus farther expounds the reciprocal rights and obligations of belligerents and neutrals. * *Supervacaneum videri possit, agere nos de his, qui extra bellum*

* It may seem superfluous to treat of those who are not engaged in the war, since against them it is clear no right of war exists. But, because, in the event of war, many things are usually done against them, especially if neighbours, on the pretext of necessity, it becomes necessary here shortly to recapitulate what we have said elsewhere; that the necessity to give any right to the property of others, must be extreme; that it is besides requisite the owner should not be himself subject to the same necessity; that, even when the necessity is clear, no more is to be taken than what it requires; namely, if custody or detection be sufficient, use is not to be taken; if use be sufficient, there must be no abuse; if abuse, or consumption, or destruction be necessary, the price of the article must be restored.

In their turn, it is the duty of those who abstain from the war, to do nothing by which he may be strengthened, who maintains an unjust cause, or by which the operations of a party waging a just war may be impeded or counteracted; according to what we said before. But in a doubtful matter, it is their duty to act impartially towards both, in permitting a passage, in furnishing provisions to military forces, in relieving besieged or blockaded places.

sunt positi, quando in hos satis constet, nullum esse Jus Bellicum. Sed quia occasione belli, multa in eos, finitimos praesertim, patrari solent, praetextâ necessitate, repetendum hic breviter, quod diximus alibi; necessitatem, ut jus aliquod det in rem alienam, summam esse debere; requiri, praeterea, ut ipso domino par necessitas non subsit: etiam ubi de necessitate constat, non ultra sumendum, quam exigit; id est, si custodia sufficiat, non sumendum usum; si usus, non sumendum abusum; si abusu sit opus, restituendum tamen rei pretium.

Vicissim, eorum, qui a bello abstinent, officium est, nihil facere, quo validior fiat is, qui improbam fovet causam, aut quo justum bellum gerentis, motus impediantur; secundum ea, quae dicta a nobis supra sunt. In re, vero, dubiâ, æquos se praeberere utrisque, in permittendo transitu, in comœatu praebebendo legionibus, in obsessis non sublevandis. Lib. III. Cap. XVII. § 1, § 3.

Such appears to have been, in general, the doctrine of Grotius, in this department of international law. And the cause of his not entering more minutely into details, respecting the commerce of neutrals with belligerents, which we shall see, occupied so much of the attention of the Maritime European states during the 18th century, appears to have been, not that he neglected or wished to avoid the questions subsequently agitated, but that, on the main points of the Maritime European law of nations, parties, in his time, were pretty much agreed, if not unanimous. The subsequent detailed learned discussions concerning neutral trade during war, were not called for, and did not take place till the gradually increasing commerce and intercourse by sea, among the European nations, occasioned those collisions of individual interests, which involved these nations in disputes. Accordingly, while we have seen that treatises abounded in the early part of the 17th century, on both sides of

the question, respecting the national appropriation of particular seas, and the freedom of navigating the oceans and open seas generally, almost the only works of that century, which treat chiefly of the navigation of neutral nations during war, did not appear till near the close of it, and were that of H. Coeccii in 1697, entitled *Disputatio Juris Gentium Publici, De Jure Belli in Amicos*, and that of Grœningius in 1698, entitled *Navigatio Libera*. And when in the course of the 17th century, such collisions became more numerous and frequent, and of greater magnitude, the mode adopted for the settlement, or rather prevention of such disputes, was by special stipulation beforehand in particular treaties, as we shall see, when we come to notice the Maritime commercial treaties of the European nations during that century.

STYPMANNUS.

In enumerating the writers on Maritime law in the course of the 17th century, after Grotius, and besides Selden and the other authors already noticed, whose works were almost solely confined to the discussion of the appropriation or non-appropriation of particular seas by particular nations, we find three of the most distinguished are Stypmannus, Kuricke, and Loccenius, natives of the more northern states of Europe, and whose works were collected by Heineccius, and published in one thick volume quarto, in 1740, under the title of *Scriptorum, de Jure Nautico, Fasciculus*.

The work of Stypmannus, Professor of Law at Greiffswalde, entitled, *Jus Maritimum*, originally published in 1652, contains a mass of information, ancient and modern, on maritime affairs, pretty well arranged. But it is chiefly occupied with the details of the private law of Maritime commerce, as observed in common by the

Maritime states of the north during peace; and almost the only parts of the work, which are of an international nature, strictly so called, are the first and the last part. In the first part, he sides with Grotius against Selden; and maintains that the oceans and open seas in general, are not capable of occupation or appropriation, but may be freely navigated by all nations; admitting, at the same time, that the parts of the sea immediately adjacent to the coasts, or shores of the territories of nations, are susceptible of dominion and jurisdiction. In chap. VI. of the first part, Stypmannus likewise gives a very learned, yet brief historical review of the different distinguished nations, who have, in succession, claimed the empire of the sea in ancient times, and also in modern times, down to the age of Gustavus Adolphus. In the fifth and last Part of the work, Stypmannus treats of the partial or limited dominion over the sea,—of Maritime jurisdiction, and of the *Custodia Maris*, which was found so very necessary during the ages that elapsed after the settlement of the northern nations, in the subjugated provinces of Rome,—of the origin of the *Ammiralitas* or Admiralty, and *Praefectura Maris*.

KURICKE.

The work of Reinold Kuricke, published at Hamburg in 1667, and reprinted under the inspection of Heinecius in 1740, contains a copy in the original German, and a Latin translation of the *Civitatum Hanseaticarum Ordinatio Nautica, et Jus Maritimum*, consisting of XV. titles, with a learned commentary thereon; and also *Diatriba de Assecurationibus*, and *Resolutio Quaestionum illustrium ad Jus Maritimum pertinentium*. But this improved Maritime Hanseatic code, promulgated in 1614, the commentary thereon, and the disquisitions just mentioned, are entirely occupied with the doctrines

of the private law of Maritime commerce, which, although from their general common and similar nature, usually observed between the individual inhabitants of different independent states, in their intercourse with each other during peace, are not strictly international, and do not embrace the international questions to which war gives rise.

LOCCENIUS.

Like the two works just mentioned, that of Loccenius, (1597—1677) *De Jure Maritimo et Navali*, published at Stockholm in 1651, and reprinted under the inspection of Heineccius in 1740, is chiefly occupied with the general and common doctrines of the private law of Maritime commerce usually observed during peace, by individuals, though of different nations, and belonging to separate independent states. But, like Stypmannus, Loccenius also dedicates some parts of his work to subjects which are properly international. Thus, in Lib. I. cap. IV. § 3, Loccenius treats briefly the much agitated question, whether, and how far, the sea is susceptible of appropriation; shewing that even about the middle of the 17th century, this dispute had, in a great measure, ceased, or been settled, on solid grounds.

“*Quae de hac materiâ, jam a viris clarissimis, Grotio in Mari libero et in Libris de Jure Belli ac Pacis, Seldeno in Mari clauso, Rivio in hist. navali, Pontano in discussionibus historicis, et ab aliis eruditis, prolixèque, sunt observata, et ingeniose utrinque disceptata, multis hic non repetam, ne actum agam. Nec illorum controversias, nunc fere quiescentes, resuscitabo; praesertim, quum eorum sententiae, in speciem, dissidentes, si rectè acceptentur, commode conciliari posse, videantur; si nimirum, discrimen inter Imperium maris universale, et particulare, ejusque modum, ritè attendatur. Do-*

minium maris universum et summum, nulli hominum, sed soli Domino Dominorum, competere liquet. Sed mare particulare, ut vocant, vel singulare, imperio Regis, principis, aut reipublicae, subesse potest, quatenus est in ejus ditione; ita, tamen, ut usus navigationis, et innoxius per id mare transitus, etiam aliis, ejus jurisdictioni non subjectis, Jure Gentium et humanitatis lege pateat. Hoc discrimen, ipsi auctores, modo laudati, si penitus inspicias, agnoscunt, utut in aliis non nullis dissentiant. Si vero nostrum non est, inter illos tantas componere lites, Audiant Reginam Angliae Elizabetham arbitram, quae sic per senatum respondit Hispanico in Angliâ legato, apud Camdenum, ad Ann. 1580. Rei alienae donationem et imaginariam proprietatem, et praescriptionem, quam obtendat Rex Hispaniae, nihil ob stare, quo minus caeteri Principes, commercia in Indicis Regionibus, exercean, et colonias, ubi Hispani non incolunt, Jure Gentium nequaquam violato, deducant; necnon oceanum illum vastum libere navigent; quum maris et aeris usus omnibus, sit communis. Nec jus in oceanum populo, aut privato, cuiquam, possit competere, quum nec naturae, nec usus publici ratio, occupationem permittat. Item ad Ann. 1602. Principes non habere jurisdictionem nisi in mari territorii suas propius adjacente; idque ut navigationes sint tutae, a piratis et hostibus. Hic modus, et finis, illius imperii singularis in mare, simul indicatur; ut nimirum hoc imperium, ita usurpetur, ut tamen navigantibus justus maris usus integer relinquatur, et ut mare purgetur a praedonibus, ac hostibus."

Loccenius likewise discusses in a sensible way, in sections V. VI. and VIII. some of the other legal points regarding the use of the sea by different nations, for the purposes of navigation. And in the same chapter IV. § IX., he touches briefly the question of the trade of neutral nations during war.

“Incidit hic illa nobilis quaestio, num liceat, vigore imperii in mare, durante bello, prohibere certarum mercium subvectionem, hosti subministrandam ab illis, qui neutrarum sunt partium, vel ab aliis? Quamvis pro varietate temporum et status, hoc a nonnullis populis non eodem modo, semper, observatum sit, tamen quid communiter, et plerarumque Gentium jure, hic obtineat, scire satis erit. Hoc autem, in confesso est, si libera transeundi facultas per alieni territorii mare, negata sit illis, qui merces hostibus advehebant, eam non tam intuitu dominii maris, quam, ne hostem commeatu, contra publicum interdictum, juvarent, denegatam esse. Hoc ipse Seldenus, qui etiam ex hac causâ, dominium maris adsertum it, inficias ire nequit.” *** “Si, vero, imperii maritimi jus, hic, forte quis obtendat, tamen frequentius, ex dictâ causâ, quam jure imperii maritimi, Edictis publicis prohibitam esse, et prohiberi, constat. earum rerum, quibus hostis vires juvarentur, non vero ita aliarum innoxiarum mercium, transvectionem, idque quodam naturae, gentium, aut belli, jure. Velut Protestantes responderunt Lusitania, quum eorum XXV. naves spoliassent, quae in portu haerentes, destinaverant frumentum Hispano tunc hosti, subvehere. ‘Jure Belli licere, tales spoliare naves; quippe rem edictis, et constitutionibus regiis, prohibitam esse.’” Apud Thuanum Hist.

“Quamvis, autem, non semper, ab extraneis, hujus modi edictorum, ratio habeatur, sed interdum distinguant tempora, causas, loca; tamen hoc facere, eos suo periculo, par est, praesertim si praemoniti sint, ut sibi, suoque damno caveant. Hic locum habet, illud Amalasuenthae ad Justinianum. ‘In hostium esse partibus, qui bello necessaria, hosti administrat.’ Nec est, quod quis commercandi libertatem, neutrarum partium titulo, excuset. Sic enim suum commodum quaeret, ne aliis hoc sit fraudi et incommodo. Quum urbes Hanseaticae

anno MDLXXXIX., graves instituerunt querelas ad Reginam Angliae, de interceptis ab Anglis sexaginta navibus, in Hispaniam, cum frumento et adparatu nautico tendentibus, quasi privilegia antiqua violata essent, respondit Regina, 'se praemonuisse, ne apparatus bellicum ad hostes Regni Angliae subveherent; subvehentes licite interceptisse; nec aliter potuisse, nisi perniciem sibi, et suo populo, sponte attrahere maluisset. Privilegia, quae sunt, leges privatae, contra publicam salutem, quae lex suprema, non adserenda. Immo, illa privilegia, Regis Edouardi Primi, Hanseaticis indulto, diserte cavere, ne merces in terras, manifestorum, et notiorum, hostium regni, Angliae, deveherent,' &c. 'Neutralitatis jure, ita utendum esse, ut, dum alterum juvemus, alterum non laedamus.' Et apud Alb. Gentilem de Jure Belli L. II. c. 22. 'Non esse hoc colere, cum utrisque amicitiam, si alteros laedas, juves alteros; ut immo hoc esse auxiliari hostibus, et cum hostibus, adversus alios facere.' Idem est Ambrosii effatum, de Off. III. c. IX. 'Si non potest alteri subveniri, nisi alter laedatur, commodius est, neutrum juvari, quam gravari alterum.'

In Lib. II. cap. IV. De jure postliminii navium, Loccenius states, it was the general consuetudinary law in his day, that after a captured vessel had been twenty-four hours in the possession of the enemy, the property of the vessel did not revert to the former owner. This doctrine does not appear to be so well founded in point of legal principle, as the rule which required deductio intra praesidia, to transfer the property. But the practice appears to have arisen from the prevailing disposition to encourage captures from the enemy. § VIII. "Quidquid, vero, clarissimi interpretes disputent, de Praedâ prius in praesidia deducendâ, quam fiat possidentis, aliud, tamen, consuetudine et moribus Europaeorum, hodie observatur, ut, nimirum, praeda capientium fiat, et

praesertim naves hostium, si a victore per diem et noctem, possessae fuerint." And agreeably to this consuetudinary rule, when a prize had been carried into a neutral port, by stress of weather, and was then claimed by the enemy, from whom the vessel had been taken, such claim was held to be invalid. § VI. "Sed quid si navis mercibus onusta, hosti jure belli adempta, et occupata, adversis ventis, aut tempestate, per plures dies, nullo hoste insequente, provecta, in communis amici portum, devenit, num repetens jus postliminii habebit, vel num licebit repetenti eam navem cum mercibus, in territorio communis amici recipere; an vero occupantis erit, et manebit. Posteriores sententiam, quae Juri Gentium et consuetudini convenientior, prae priori, amplectendam, arbitramur." On the other hand, § IX. "Si quis statim animo recuperandae praedae hostem insecutus sit, et ita fugientis vestigia presserit, ut is ubi iterum de praeda, jam jamque dimicandum cernit, in portum regis amici se recipiat; eo casu, conflictus perdurasse, et animus possessionis incontinenter recuperandae, adesse praesumitur."

In Lib. II. cap. IV. § XI., Loccenius lays down the law, that goods on board the vessels of the enemy, are merely presumed, from the place in which they are found, to be the property of the enemy; that, if found not to be so, they are not lawful prize; but that, if the enemy have any real right in such goods, it may be acquired by the captors; further, that neutral vessels are not lawful prize, on account of their carrying goods belonging to the enemy.

"Res in hostium navibus repertae, praesumuntur esse hostiles, donec contrarium probetur. Si vero probetur, non esse hostiles, capientium non fiunt, etsi apud hostes inventae; praesertim si domini hostium non sint subditi, nec hostilis animi. Si vero hostis, in illis rebus, jus aliquod, habeat, quod possessioni connectatur, ut pig-

noris, servitutis, retentionis, occupantibus adquiri possunt. Sed nec amicorum naves in praedam veniunt, ob res, in illis, hostiles; nisi ex consensu dominorum navis, id factum sit; alioqui res ipsae solae, non naves, in praedam veniunt."

In Lib. III. cap. IV. § 6, De Repressaliis, et Arrestationibus navium, Loccenius thus treats of contraband of war, and the responsibility of the state or community, for the illegal acts of its individual citizens or subjects. § VI. "Quid, vero, si privati mercatores, advehant commercium, aut pulverem tormentarium hosti, aut alii privati cives, in alienam rempublicam quid committant, ac delinquant, num fas est eo nomine, detineri, non solum, ipsorum auctorum, sed et aliorum, naves, si illi forte elapsi sint, donec id vel illi luant, vel communitas, aut Rector eorum? Civitas aut Rectores ejus, non tenentur, ex subditi facto, illicito, aut delicto, nisi sciverint; et cum prohibendi emendandique facultatem haberent, non prohibuerint, et emendârint, aut interpellati, pro merito, non puniverint nocentem, vel arbitrio interpellantium, permiserint."

The preceding quotations from the work of this very able, learned, and judicious Danish, but usually considered Swedish, Maritime jurist, afford authentic and distinct evidence, that about the middle of the 17th century, the general Maritime law of nations, as understood and practised in the Baltic, was, in all important points, pretty much the same, as we have seen from Grotius, it was in the North Sea and Western Ocean, and, as we formerly saw from the *Consolato del Mare*, it was in the Mediterranean. The chief, if not the only change or deviation, which began about that time to take place, was effected by force of express paction and convention, and limited to the contracting parties. And this conventional arrangement, we shall afterwards have

occasion to consider, when we come to notice the Maritime and commercial treaties concluded between or among the European nations during the 17th century. At present, we proceed with the works of the principal remaining jurists, which appeared during that century, and the collections of the records of usages made by them.

CLEIRAC.

As one of these Jurists, we may next notice Cleirac, the editor of the *Us et Coutumes de la Mer*; the first part containing the *Jugemens d' Oleron*, the *Ordonnances de Wisby*, and the *Reglemens de la Hanse Teutonique*; the second part containing *Des Contrats Maritimes et Du Commerce naval*, particularly *Le Guidon de la Mer*; the third part containing *la Jurisdiction de la Marine*, consisting of extracts from the *Ordonnances de la Marine*, of the French Kings, down to the date of the publication in 1661. And perhaps this is the character in which Cleirac ought to be viewed, namely, as a collector or compiler of the general rules and usages of Maritime and commercial law, rather than as a mere French lawyer, expounding the law, whether national or international, as enacted or administered in his own country. In this compilation, however, we find chiefly the doctrines of private Maritime and commercial law; which, from their general and common nature, are usually observed by individuals in their Maritime commercial dealings during peace, although they be members of separate and independent states, and which have, therefore, been said to form a part of the law of nations, but very little of what is strictly international law, especially during war. Chapters VI. and XI. of the *Guidon de la Mer*, indeed, treat of prizes and ransoms, and Chapter X. of reprisals and letters of

marque; but almost solely with reference to the contract of insurance, and the reciprocal rights of the parties to that contract. And for farther notice of Cleirac, we may refer to our Historical sketch of the private law of Maritime commerce; reserving for more full consideration the rules of Maritime international law, as established or administered by the French government, during the 17th century, particularly under the celebrated Ordonnance de la Marine of Louis XIV. in 1681.

PUFENDORFF.

We have now arrived at that portion of the 17th century, during which the works of the celebrated Pufendorff appeared. But as observed by us, along with Von Ompteda, in our general Inquiries in International law, that author did not, in these works, contribute much to the advancement of the law of nations, partly from his holding the law of nations to be identical with the law of nature, and not entitled to the position and rank of a separate and independent science, partly from his comprehending under the law of nature, all the moral or ethical duties of men, both as individuals, and in their collective or corporate capacity; and from his not marking the distinction between justice and the other virtues, inasmuch as the duties or obligations of justice, involve or imply rights in other parties, which have been called perfect, and are susceptible of enforcement by physical means; whereas the other virtues involve or imply merely, what have been rather absurdly denominated imperfect rights, but which cannot be enforced, and are in reality no rights at all. While he entertained this opinion, Pufendorff was not likely to expound either enlarged or profound doctrine in practical Maritime international law, properly so called, whether natural or positive, especially during war.

Accordingly, while he does not, like Stypmannus and Loccenius, detail those general and common rules of Maritime law, which are applicable, not only between the citizens or subjects of one and the same state and government, but also between the citizens or subjects of different separate and independent states and governments during peace, and have therefore been so far held to form a part of the law of nations, he does little more than repeat in Lib. IV. cap. V. § 5, the doctrine of Grotius, and of the other two authors just mentioned, *de Dominio Maris*; and does not begin to treat of the laws of war, till chap. VI. of book VIII. and last of his work. The subsequent chapters of this last book, which are at all of an international nature, embrace merely the conventional department; cap. VII. treating of conventions made with the enemy in the course of the war; cap. VIII. of the conventions which tend to the re-establishment of peace; cap. IX. of alliances and public conventions made without the order of the sovereign; and cap. X. of contracts and other conventions or premises of kings or princes. Nay, even in chapter VI. before alluded to, which treats expressly of the laws of war, the exposition given by Pufendorff is neither full and complete, nor very exact or profound; reference being in most cases made to Grotius, for the practice of international law. And to exhibit the views of Pufendorff generally, it will be sufficient to quote section VII. of this chapter, with regard to the extent to which hostilities may be carried, from the French translation by Barbeyrac, which is certainly a great improvement on the original work.

“Pour ce qui est de la force ouverte, ou des actes violens d’hostilité, que l’on exerce contre l’Ennemi, ou en sa personne, ou en ses biens, il faut distinguer le mal, qu’on peut lui faire purement et simplement en vertu

de l'état de guerre, et la moderation, qu'exige l'humanité. Comme la Loi naturelle impose également à chacun, l'obligation de pratiquer les devoirs de la paix, celui, qui les viole le premier, à notre égard, nous dispense autant qu'en lui est, de les observer désormais envers lui; et par cela seul qu'il se déclare notre ennemi il nous autorise, à agir contre lui par des actes d'hostilité, peussés à l'infini, ou aussi loin, qu'on le jugera à propos: d'autant plus, qu'on ne pourroit jamais obtenir la fin que l'on se propose, dans les guerres tant offensives que defensives, si l'on étoit indispensablement obligé de se tenir dans certaines bornes, et de ne se porter jamais aux dernières extrémités contre un ennemi. C'est pourquoi, les guerres déclarées dans les formes, renferment un espèce de convention, qui se réduit à ceci; *Faites contre moi, ce que vous pourrez; je ferai contre vous de mon côté, tout ce qui sera possible.* Cela a lieu, non, seulement, lors qu'un ennemi travaille à nous perdre entièrement, mais encore quand il ne veut nous faire du mal qu'à un certain point. Car il n'a pas plus de droit de nous faire la moindre injure que la plus grande. Ainsi, l'on peut agir contre lui, non seulement jusques à ce que l'on se soit mis à couvert du danger dont il nous menacoit, ou que l'on ait recouvré ce qui nous a enlevé injustement, ou que l'on se soit fait rendre, ce qu'il nous devoit; mais encore jusques à ce qu'il nous ait donné, de bonnes suretez, pour l'avenir; car cela même qu'il a fallu, les lui arracher, par la voie des Armes, montre bien, qu'il est encore dans la disposition de nous faire du mal, à la première occasion qu'il en trouvera. Et il n'est pas toujours injuste, de rendre plus de mal qu'on n'en a reçu. Car ce que disent quelques-uns qu'il faut garder en cela une juste proportion, n'a lieu, que dans les tribunaux, ou un supérieur inflige des peines à ceux,

qui dependent de lui. Mais les maux, que l'on cause à quelqu'un, par droit de guerre, ne sont pas des peines proprement ainsi nommées; car on ne les souffre pas en vertu de la sentence d'un superieur, considéré comme tel, et ils ne tendent pas non plus directement, à corriger l'offenseur, et à détourner les autres du crime, par son exemple, mais uniquement à la defense de la personne lezée, et au maintien de ses droits. Or, on peut, pour cet éffet, mettre légitimement en usage, tous les moyens, que nous paroissent les plus propres, contre un injuste offenseur, qui par des insultes, nous a mis en droit, de pousser à l'infini, les actes d'hostilité, sans lui faire aucun tort, jusques à ce qu'on en vienne avec lui, à un accommodement. La loi de l'Humanite, met, neanmoins, des bornes, à l'usage de ce droit. Elle veut, que l'on considère, non seulement si tels, ou tels actes, d'hostilité, peuvent être exercés contre un ennemi, sans qu'il ait lieu, de s'en plaindre; mais encore, s'ils sont dignes d'un vainqueur humain, ou même d'un vainqueur genereux. Ainsi, autant qu'il est possible, et que notre defense, et notre surété à venir, nous le permettent, il faut suivre, dans les maux, qu'on fait à un ennemi, les regles, que les tribunaux Politiques observent, dans la punition des crimes, et dans la taxe des dommages et interets. Souvent même notre propre intérêt nous oblige à moderer la rigueur des droits de la guerre, de peur que, comme les armes sont journalières, nous n'éprouvions quelque jour, le meme traitement, que nous aurons fait à un ennemi. Au reste, si l'on veut savoir, en quoi consistent ces temperamens, aussi bien, que l'étendue des droits de la guerre, et par rapport à l'ennemi, et par rapport à ceux, qui lui fournissent quelque chose, on trouvera là-dessus, amplement, de quoi se satisfaire, dans le Traité de Grotius, du Droit de la guerre et de la Paix, en troisième Livre."

But while we thus find so little in the department of Maritime international law, in his great works published by Pufendorff himself, we are obliged to the juridical compiler, Groningius, for publishing, and to the able translator of Pufendorff's great work, *de Jure Naturae et Gentium*, for bringing into notice a letter addressed by Pufendorff to Groningius, who, in 1692, had consulted the former about a work which the latter proposed to publish, under the title of *Navigatio Libera*. This letter is valuable, as shewing the opinion then entertained of the claims of neutral traders during war; and that these claims which had been urged by the Hanse towns against belligerents, but had never been recognized by themselves when engaged in war, were then viewed in the same light as now, and by no means admitted as an established or integral part of the law of nations. We shall, therefore, quote the whole of the note, which is subjoined by Barbeyrac to section VII. before quoted, and contains this letter.

“Pour donner une idée de cette matière, il faut dire quelque chose, en general, de la Neutralité, dont notre auteur ne parle nulle part. J’émprunterai ici à peu près, ce que dit M. Buddens, dans ses ‘*Elémens de Philosophie Pratique*,’ part II. cap. V. sect. VI. § 3, 6, &c. Il y a une Neutralité Générale, et une Neutralité particulière. La Neutralité Générale, c’est, lorsque, sans être allié d’aucun de deux Ennemis, qui se font la guerre, on est tout prêt, de rendre également à l’un, et à l’autre, les devoirs au quels, chaque peuple est naturellement tenu envers les autres. La Neutralité particulière, c’est, lorsqu’ on s’est particulièrement engagé, à être neutre, par quelque convention, ou expresse, ou tacite. La dernière sorte de Neutralité est, au plein, et entière lorsque l’ on agit également, à tous égards, envers l’ un et l’ autre partie; ou limitée, en

sorte, que l' on favorise, une partie, plus que l' autre, à l' égard de certaines choses, et de certains actions. On ne sauroit légitimément, contraindre personne à entrer dans une Neutralité particulière, parce qu' il est libre à chacun de faire, ou de ne pas faire, des traités, et des alliances, ou qu' on ne peut du moins, y être tenu, qu' en vertu d' une obligation imparfaite. Mais celui, qui a entrepris une guerre juste, peut obliger les autres peuples, à garder exactement la Neutralité generale, c' est à dire, a ne pas favoriser son ennemi, plus que lui même. Voici donc, à quoi se reduisent les devoirs des peuples Neutres. Ils sont obligés de pratiquer également, envers l' une et l' autre de ceux, qui sont en guerre, les loix du Droit Naturel, tant absolues que conditionnelles, soit qu' elles imposent une obligation parfaite, ou seulement imparfaite. S' ils rendent a l' un d' eux, quelque service d' humanité, ils ne doivent pas le refuser à l' autre; à moins qu' il n' y ait quelque raison manifeste, qui les engage à faire, en faveur de l' un, quelque chose, que l' autre n' avoit d' ailleurs, aucun droit d' exiger. Mais ils ne sont tenu, de rendre les services de l' humanité à aucun de deux parties, lorsqu' ils s' exposeroient à de grands dangers en les refusant à l' autre, qui a autant de droit de les exiger. Ils ne doivent fournir, ni a l' une, ni a l' autre, les choses, qui servent a exercer l' actes d' hostilités, à moins qu' ils n' y soient autorisés par quelque engagement particulier, et pour celles, qui ne sont d' aucun usage, à la guerre, si on les fournit à l' un, il faut les fournir aussi à l' autre. Ils doivent travailler, de tout leur possible, à faire en sorte, que l' on en vienne à un accommodement, que la partie lezée obtienne satisfaction, et que la guerre finisse, au plutôt. Que, s' ils se sont engagés, en particulier, à quelque chose, ils doivent l' executer punctuellement. D' autre coté, il faut, que ceux, qui sont en

guerre, observent exactement envers les peuples neutres, les Loix de la Sociabilité; et qu' ils ne souffrent pas, qu' on les pille, ou qu' on ravage leur pais. Ils peuvent, pourtant, dans une extreme necessité, s' émparer d'une place, située en pais neutre; bien entendu, qu' aussitôt, que le peril sera passé, on la rende, à son maitre, en lui paiant le dommage, qu' il en a reçu. Au reste, pour ce qui regarde la question, si l' on peut empêcher, que les peuples neutres ne trafiquent, pendant le cours de la guerre, avec notre ennemi, il y a une lettre de notre auteur, qui fut publié en 1701, dans un Livre imprimé à Hambourg, sous ce titre. "Jo. Groningii Bibliotheca universalis, Librorum Juridicorum, p. 105, des Traités, qui sont a la tête de l' ouvrage. Je vais la traduire, et parce qu' elle est courte, et par la même raison, que le celebre M. Thomasius, dans sa Paulo plenior Hist. Jur. Natural, a émprunté de ce livre, quelques autres lettres, dont une est de notre auteur; c' est que ce M. Groningius, étant un Compileur de tres mauvais gout, les exemplaires de sa rhapsodie ont servi aux épiciérs et aux Beurrières et par là sont devenus rares. Il avait formé, in 1692, le dessein de composer un Traité De liberá Navigatione, qu' il publia depuis, je ne sais quand, car je ne l' ai jamais vu. Avant d' exécuter son projet, il consulta M. de Pufendorff, et lui exposa, en gros, les principes, sur lesquels, il batiroit. Voici la Reponse, que notre auteur lui fit, de Berlin. 'L' ouvrage, Monsieur, que vous promettez, touchant la Liberté de la Navigation, excite ma curiosité. C' est un beau sujet, et sur lequel, personne, que je sache, n'a encore fait de traité particulier. Je crains bien néanmoins, à en juger, par ce que vous touchez, dans votre lettre, que vous ne trouviez des gens, qui vous contesteront vos idées. La question est, certainement, de nombre de celles, qui n' ont pas encore été établies sur

des fondemens clairs et indubitables, qui puissent faire réglé par tout le monde; Dans tous les exemples, qu'on allegue, il y a presque toujours, quelque chose de droit, et quelque chose de fait. Chacun, d'ordinaire, permet, ou défend, le commerce maritime des peuples neutres, avec les ennemis, selon qu'il lui importe, d'entretenir amitié avec ces peuples, ou qu'il se sent, de forces, pour obtenir d'eux, ce qu'il souhaite. Les Anglois, et les Hollandois, peuvent dire, sans absurdité, Qu'il leur est permis, de faire tout le mal, qu'ils peuvent, aux François, avec qui ils sont en guerre, et par conséquent d'employer ce moien, le plus propre, à les affoiblir, qui consisté à traverser ou empêcher leur commerce: Qu'il n'est pas juste, que les peuples neutres s'enrichissent à leurs depens: et en attirant à eux un commerce, interrompu pour l'Angleterre, et la Hollande, fournissent à la France, des secours, pour continuer la guerre: D'autant plus, que l'Angleterre et la Hollande, favorisent ordinairement, d'une autre manière, le commerce de ces peuples, et leur donnent occasion de transporter et debiter, ailleurs, les marchandises de leur cru, ou de leur fabrique: " En un mot, qu'on veut bien leur laisser en son entier le Commerce, qu'ils sont accoutumé de faire, en tems de paix; mais qu'on ne doit pas souffrir, qu'ils l'augmente, à l'occasion de la guerre, au prejudice des Anglois et des Hollandois. Mais comme cette matière du commerce, et de la navigation, ne dépend pas, tant des régles, fondées sur une Loi générale, que sur les Conventions particulières entre les Peuples, pour pouvoir porter, un jugement solide, de la question, dont il s'agit il faut examiner avant toutes choses, quels Traités il y a eu là-dessus, entre les Rois du Nord et l'Angleterre, ou la Hollande; et si celles-ci leur ont offert, des conditions justes, et raisonnables. D'autre coté, néanmoins, si les Rois du Nord peuvent maintenir leur commerce

avec la France, en faisant escorter les vaisseaux Marchands par des navires de guerre, pourvu qu'il n'ait point de marchandises de contrebande, personne n'y trouvera à redire; la Loi de l'humanité et de l'équité, entre nations, ne s'étendant pas jusqu'à exiger, que, sans aucun nécessité, un peuple se prive de son profit, en faveur d'un autre. Mais comme l'avidité des marchands est si grande, que, pour le moindre gain, ils ne font aucun scrupule, d'aller au déla des justes bornes, les nations, qui sont en guerre, peuvent faire visiter les vaisseaux des peuples neutres; et s'il s'y trouve des marchandises défendues, les confisquer de plein droit. D'ailleurs, Je ne suis pas surpris, que les Rois du Nord, aient plus d'égard, à l'intérêt général de toute l'Europe, qu'aux plaintes de quelques Marchands, avides du gain, qui ne se soucient pas, que tout aille sens dessus dessous, pourvu qu'ils satisfassent leur avarice. Ces mêmes Princes jugent sagement, qu'il n'est pas à propos, pour eux, de prendre ces mesures précipitées, pendant que d'autres Peuples travaillent de toutes leur forces, à réduire dans un état de juste mediocrité, cette Puissance insolente, qui menace de mettre toute l'Europe dans ses fers, et en même temp, de ruiner la Religion Protestante. Ce qui, étant aussi de l'intérêt, des Couronnes du Nord, il ne seroit, ni juste, ni raisonnable, que pour un petit profit, à tems, elles troublassent un dessein si salutaire, dont on tache de venir à bout, sans qu'il leur en coûte rien, et qu'ils courent aucun risque." Le Droit de La Nature, et des Gens, traduit par Barbeyrac, 1750, Tom. II. pp. 558, 559.

GRONINGIUS.

This work of Groningius, here rather contemptuously alluded to by Barbeyrac, seems from this letter of Pufendorff, to have been one of the first attempts, if

not the first attempt of any jurist, to support as valid, by the natural law of nations, the for them practically convenient doctrine of "free ship, free goods," maintained by the Hanseatic confederacy, when in the zenith of their power, with reference to all nations except themselves. The work appears to have been originally published at Rostoch in 1695, and again at Lubec in 1698, under the title, *Tractatus de Navigatione Libera, quo, quid Juris Pacatis, ad Belligerentium Commercia, competit, ex actis, atque immutis Juris Gentium principiis, deducitur, discussis simul, Hugonis Grotii, Pufendorffii, aliorumque, argumentis.* Von Kamptz *Neue Literatur des Volkerrechts*, p. 223. And, although the very learned Barbeyrac had never seen it, it appeared in vol. IV. in folio, of the commentary on Grotius, by Henry Baron de Cocceii, along with the dissertations of Grotius and Selden, and of several of the other jurists before mentioned. The treatise is evidently written in favour of the cause of Louis XIV. and in support of the claims of the subjects of the Danish and Swedish governments, then neutral, to carry on an almost unlimited commerce with France, notwithstanding the war which Great Britain and the United Provinces then waged against that kingdom, in defence of the liberties and independence of the European nations. But the work otherwise is, by no means, so contemptible, or of so little merit, as Barbeyrac seems to have supposed. Indeed, Groningius appears to have anticipated, and to have set the example to Hübner, who, about the middle of the 18th century, we shall afterwards see, so stoutly maintained the claims of neutrals to carry on maritime commerce with belligerents, without almost any constraint whatever.

In his first chapter, entitled, *Jure Gentium, Mercaturam introductam, eamve esse inter quosvis liberam,*

Groningius thus traces the origin of commerce, and the expediency of its freedom. Videtur natura, bono consilio, non omni terrae voluisse dare omnia, ut scilicet tanto arctius jungerentur gentes, mutuisque subsidiis se invicem juvarent. Hinc navigatio inventa, ut per hujus adminicula, aliena, ad nos adferantur, contra superflua auferantur; hunc modum, ipsâ ratione naturali, et jure gentium dictitante. Ex hoc fonte, jam fluit libertas commerciorum; nam cum haec summe necessaria sint ad conservandam Societatem humanam, immo per haec, quasi, in urfam Societatem redigatur totum genus humanum, in tot gentes dispersum; hinc ea impediri, citra injuriam, a nemine posse, credidere gentes.

In his second chapter, entitled, *Licere, Jure Gentium*, neutri Parti addicto, cum belligerentibus, commercia exercere, he objects to Grotius, and other preceding jurists, founding the liberty of commerce on conventions or treaties; and represents it as founded on the natural, and supported by the consuetudinary, law of nations. Thus, *Diversae hujusmodi conventiones, inter gentes, initae, persuaderunt, Grotio, et Alberico Gentili, quod hanc quaestionem, quid liceat in eos, qui hostes non sunt, aut dici nolunt, sed hostibus res aliquas subministrant, ad Jus naturae retulerint, cum ex historiis nihil comperire potuerint, eâ de re, jure voluntario Gentium, esse constitutum. Inde secundum illud, distinguunt inter res, 1, quae in bello, tantum usum habent, 2, quae in bello nullum habent usum, sed voluptati, tantum, inserviunt, 3, quae in, et extra, bellum, usum habent. Istas ad hostes deferre permittunt; illas non item; has intercipiendi, si aliter me tueri, non possum, sed sub onere restitutionis, licentiam dant. Sed haec sententia valde periculosa; quod, si, enim, fingamus nulla pacta, atque conventiones inter gentes, eum in finem extare, nihilque circa commercia pacatorum cum belligeren-*

tibus conventum esse, sane ob defectum Juris Gentium, ejusve incertitudinem, dubium foret, an omnia commercia pacatorum, cum bellantibus, cessare deberent, aut in quibus rebus ea permittenda essent; quod, uno in libertate commerciorum, se fundante, altero belli rigorem, suumque detrimentum, obtendente; facile, imo semper, bellandi occasionem praeberet, quo ipso securitas generis humani, maxime periclitaretur. Inde omnino, quid pacatis, quid bellantibus in statu hostili, circa commercia, liceat, Jus Gentium definire debet. Nec est, quod Grotius censeat, eâ de re, nihil Jure voluntario Gentium esse constitutum, cum ex historiis id comperire non potuerit. Nescio, quo fato, haec verba viro, alias incomparabili, exciderent. Primo enim, ex iis exemplis, quae, in annotatis plenâ manu, cumulavit, et ex iis, quae in sequentibus adjiciemus, satis apparet, gentes existimasse, non licere sibi commoda hostium ex commerciis cum pacatis, alio modo intervertere, quam si hi, ad illas, merces, quae in bello tantum usum praebent, adferant; Secunde, Etsi demus nihil ex historiis constare, de commerciorum jure, pacatis cum bellantibus libero, exinde tamen non sequeretur, nihil, Jure Gentium propterea, hac de re constitutum esse; quippe Jus Gentium, historiis non tantum absolvitur, cum multa longo usu, inter Gentes recepta, reperiuntur, quae nihilominus ad Jus Gentium, proprie dictum, referuntur; quamvis nihil de eo literis consignatum, aut historiis insertum. Et contra, ex historiis, quandoque constat, non pauca esse, quae apud omnes incirca gentes, peraeque observantur, et custodiantur; et tamen ea non tam Juris Gentium, quam civilis, esse. Ideoque, in omni negotio, quod Juris Gentium esse creditur, non tantum ad historias respiciendum erit, seu, an, quoad casum controversum, mutua quaedam Gentium observantia, reperiatur, sed et quid Jus naturae, ad

illam observantiam dicat, an eam reprobet, an dimittat, an ex hoc deducta, an vero ex civili aliquâ ratione. Jus Gentium, enim, pleraque sua mutuatur ex Jure naturae, ex eoque deductas conclusiones, ad communem tranquillitatem infert; sicut in praesenti quaestione, ubi de mercibus hosti, a pacato, subministrandis, vel non, controvertitur, non difficiles, sunt Juris Gentium conclusiones. Natura, enim, cum non dedit uni terrae, omnia, ut communis quaedam societas inter Gentes esset, quae sane cessaret, et nulla gens alteram peteret, si nemo alterius auxilio indigeret, inde Jus naturae vult, ut liber sit cuique ad quemcunque aditus, ut sic quilibet indigentiam suam aliunde supplere posset. Est, quoque, Juris naturae Regula; neminem esse laedendum. Ex his jam Jus Gentium infert, Flagrante inter duos bello, Pacatorum, cum uno vel altero, bellantium, commercia cessare, non posse, cum alias tolleretur societas humana; sine culpâ laederentur pacati; at cum et, hic, laesio, bellantium concurrat, si pacatis indistincte liceret, ad unum, vel alterum, merces bellicas, deferre, praepremis, si unius vires fractae, atque sic ex eo restitui periculum, alter vero his mercibus plane non indigeret. Inde legem naturae, ita temperat Jus Gentium, ut, in compensandâ mutuâ laesione, respiciat ad id, quod primitus occasionem dederit, ut commercia quoad certas merces, cessare, debeant, cumque illud hic sit dissidium bellantium, et pacati extra culpam inveniantur, inde, concludit, quod et incommodum magis ad illos, quam ad hos spectare, debeat; ne autem nimis laedantur, aequum censet, ut pacati abstineant, ad unum, vel alterum, bellantium, merces bellicas deferre, reservatâ ipsis potestate quoad reliquas merces.

Farther, Groningius contends, in the subsequent chapters of his treatise, that the British and Dutch governments could not legally prohibit the Danes and the

Swedes from trading with the French, *ex titulo Domini Maritimi*, and so far correctly; or *ex capite Injusti Belli a Gallis illati*; or *ex capite Foederis cum illis initi*; or *Jure Gentium*, nisi in iis rebus, quae in bello tantum usum habent, et praeter casum, si locus ab iis obsidione cinctus. He farther contends, in his subsequent chapters, VII. *Anglos et Batavos non posse sufflaminae Suecorum ac Danorum, Commercia, ex capite innoxiae utilitatis, aut ex praetextu laesionis*; VIII. *Nullâ aequitate ac ratione niti, Anglos et Batavos prohibendo Suecis et Danis Merces ad Gallos deferre*. IX. *Anglos et Batavos vi pacti, conventi, esse obstrictos, ad permittenda Suecorum ac Danorum, cum Gallis, commercia*. And in chapter XI. he concludes, *Licere Serenissimis Suecorum, et Danorum, Regibus, propter damnum Subditis, à Piratis illatum, repressaliis uti, et negatum Jus Commercii, armis asserere*.

From these quotations it is manifest, that this comparatively obscure, or at least neglected writer, not only anticipated, by more than half a century, Hübner, the celebrated champion of the pretensions of neutrals; but, by recommending the enforcement of these claims, even anticipated the Russian Empress Catherine herself, in her favourite scheme of the Armed Neutrality.

HENRY BARON DE COCCEII.

In tracing the progress of Maritime international law during the 17th century, we have next to notice, as also appearing near the close of that century, the works on neutral trade during war, of Henry the elder Baron de Cocceii, the very learned and able, but rather diffuse, commentator on Grotius. The first of these treatises was composed in 1686, and is entitled, *Disputatio de Commissis, ubi De Mercibus Contrabando*. The other was composed in 1697, and is entitled, *Disputatio De*

Jure Belli, in Amicos. The first treats of contraband generally, including contraband of war. And as the other repeats nearly the same views, and treats more fully of the rights of neutrals generally, it will be sufficient to extract from it a few leading passages.

After intimating, non respici hic mera officia mediorum, sed vera jura belli, and reciting the distinctions made by Grotius and other preceding jurists, between the different descriptions of goods, as adapted for warlike operations or not, Cocceii proceeds, § 13, Horum igitur, unde arcessenda sit decisio, videamus. Scilicet duabus regulis contrariis, maxime res definienda erit; quarum prima est, orto inter duos populos bello, *non excludi, jure gentium, pacatos, a libero cum hostibus commercio*; jure enim suo, in res suas, utuntur, in quas alteri nihil juris est; et, cum pax hosti, cum pacatis duret, pacis quoque jura, nimirum commercia, inter eosdem, durare, necesse est. Altera vere, *qui hosti nostro, in bello assistit, eum hostis loco esse*. Idem enim actus est, ex quo injuria, vel damnum, nobis infertur, actus scilicet, tam assistentis, quam inferentis.

§ 14. Verum, initio, primae regulae fines, rité constituendi sunt. Illa igitur restringi debet (1) ad commercia pacis, non belli, seu quae propria bellorum sunt, uti durante bello, arma ministrare; is enim actus excedit commercio pacis, eoque magis assistitur hosti in bello, quam commercium pacis, cum eo exercetur. (2) Commercium illa pacis, non cum alterutro hostium, solo, sed cum utroque, ita aequaliter exercenda sunt, ut ne videatur, alterum alteri praeferre. Hoc ipso, enim, desinit esse medius, et unius partis judicium magis sequi videtur, atque adeo in partibus jam esse, et bello miscere incipit.

§ 15. Hinc is, qui hosti frumentum venale, vel alias, commeatum, subvehit, non ideo hostis statim loco erit;

vel ad reparationem damni tibi tenebitur, etsi fortè ea causa sit, cur tu pulsus fueris, vel cum damno cesseris, modo tibi id pro eodem pretio, vel tantundem, petenti, non denegaverit. Nam alias, eàdem ratione, dicendum esset, si tibi vendidisset frumentum, eaque causa fuisset, cur hostis tuus victus sit, jam huic eum teneri, ad reparationem damni, cum utriusque hostis eadem ratio sit. Igitur hoc ipsum potius est officium verum, mediorum et pacatorum, ne commerciorum consuetudine, alteri parti, prae alterâ, faveant.

§ 17. Hinc etsi hostile, per se, non sit, si pacatus frumentum hosti tuo venum exhibeat, si tamen id facit, animo hostis sublevandi, et ab imminente periculo, liberandi, etsi justo pretio vendat, tamen hostium loco erit, et jus belli in eum obtinebit; quia animo hostili, non commercii exercendi, neque animo sibi lucrandi; sed tibi nocendi, id facit. Quo fit, ut non facto ipso, tantum, sed et studiis, et animis, hostium partes tueatur.

§ 18. Hinc etsi ferrum, et arma, quoque, commercio, in pace, commutari, possint, cum nemini injuria tunc fiat; nemoque impedire id possit, ubi nemo hostis est; nec tunc in bello assistere intelligatur, ubi, bellum non est; tamen, si, durante bello, id fiat, indistincte, jus belli in eum, qui distrahit, obtinebit. Non minus enim ille hosti assistit, qui arma et instrumenta bellica, quam qui militem, manum, copiasque auxiliares, etsi pretio accepto, animoque lucrandi, summittit. In summa, enim, belli, nihil interest, an quid hosti tuo, odio tui, an spe lucrì, assistit.

§ 19. Arma itaque, et instrumenta, bellica, durante bello, semper sunt merces interdictae, seu contrabando, idque communi Gentium consensu, firmatum est.

§ 20. Hinc, Si quis hosti, etsi indigenti maxime, pecuniae summam credat, qua ipse arma militesque comparat, nullum, ideo, erit, in ipsum jus belli; cum ea

quoque res liberi commercii, et pacis sit, modo intra officium mediorum, id fiat, juxta, § 15. At si hostem nostrum, inopiâ pecuniae, in praesenti periculo, constitutum, creditâ pecuniâ, inde liberet, vel animo alteri nocendi, id faciat, obtinebit in eum jus belli, § 15.

§ 31. Plane, si usum in bello habeant, pacatorum res, apud hostes depositae, non erunt exemptae jure belli; uti, si frumenta, sales, &c. deposita sunt, nedum arma. Iis enim, cum hostes, vel se conservare, vel adversus nos, uti possint, necessario nobis jus quoque competit, haec hostium praesidia, et quasi munimenta invadendi, eodemque jure, quo et hostes ipsi, ea occupandi. Idemque erit, si pecunia numerata deposita sit, quâ necessaria ad bellum comparari possunt.

§ 32. Ducit nos materiarum ordo, ad res pacatorum, quae in hostium navibus reperiuntur; sed, si appareat, eas esse amicorum, non hostium, cessabit jus belli, cum nec hostium sint, nec in hostium potestate, ut iis abuti, ad resistendum, nobis possint. Ita bene judicatum in Belgis, refert Grotius, Lib. III. cap. 6, § 6.

§ 33. Alia vero quaestio est, si res illae ad hostes nostros destinatae sunt, etsi non traditae; nam illae, si juvandi hostes causâ, submituntur, hostiles sunt, et diripi possunt, § 17. Si, nudi commercii gratiâ, non quidem capi possunt; sed si nobis, pretium idem offerentibus, domini eorum vendere nolint, exeunt mediorum partes, et hostiles sequi, incipiunt, § 15.

§ 34. Nec aliter decidenda res est, si, e contrario, navis amicorum, merces hostium ferat; merces enim diripi possunt, salvâ navi, modo dominus, nudi commercii, non juvandi hostis, animum habuerit, juxta ea, quae ante jam exposita sunt.

LEIBNITZ.

Towards the close of the 17th century, also, the great

Leibnitz published his *Codex Juris Gentium Diplomaticus*, and prefixed to it an admirable preface, in the following perspicuous passages of which, he distinctly recognizes the existence of the law of nations, as partly natural, partly positive, arising from obligatory customs and conventions, or treaties.

Praeter aeterna naturae rationalis jura ex divino fonte fluentia, jus etiam voluntarium habetur receptum, moribus, vel a superiore, constitutum. Et in republicâ quidem, jus civile, ab eo vim accepit, qui summam potestatem habet; extra rempublicam, vel inter eos, qui summae potestatis participes, sunt, locus est Juri Gentium, voluntario, tacito populorum consensu recepto. Neque vero necesse est, ut sit omnium Gentium, vel omnium temporum; cum in multis arbitror, aliud Indis, aliud Europaeis, placere; et apud nos ipsos, saeculorum decursu mutari;—quod vel hoc ipsum opus indicare potest. Basis, igitur, Juris Fecialis, inter Gentes, ipsum naturae jus est. Huic Gentium Placita inaedificata sunt, variabilia, temporibus, locisque. But amid the multitude of his varied important occupations, Leibnitz does not appear to have had leisure, or to have felt himself called upon to investigate in detail, the more minute doctrines of Maritime international law.

MOLLOY AND LORD STAIR.

There likewise appeared, towards the close of the 17th century, two valuable British treatises on the Maritime law of nations; the one, the treatise of the able and learned English barrister, Molloy, *De Jure Maritimo et Navali*; the other, the treatise on prize law, by the eminent Scotch judge, Lord Stair. Both these treatises contain a good deal of general Maritime international legal doctrine; but may perhaps be noticed with more propriety, when we come to view Maritime international

law, as administered during the 17th century, under the ordinances and statutes, and by the judicial tribunals of the different European nations.

SECTION III.

Internal Statutes, Ordinances, and Judicial determinations of Maritime States, as exhibiting their administration of Maritime International law during war, in the 17th century.

HAVING thus traced the principles of the natural and consuetudinary law of nations, especially during war, in the course of the 17th century, as recorded in the writings of the principal international jurists, from Grotius to Loccenius, Pufendorff, and Cocceii, we have next to consider, during that century, the internal legislative enactments, or sovereign ordinances and judicial determinations of the principal Maritime states of Europe, as exhibiting their practical administration of Maritime international law, and as constituting that law, at least against, or in a question with them, upon the indisputable principle of reciprocity.

ITALIAN STATES.

To commence with the Italian Maritime states, so far as appears from the works of Julius Ferretas, *De Jure et Re Navali, et de Belli aquatici praeceptis*, 1579, of Roccus, *De Navibus et Naulo, et Assecurationibus*, 1655, of Cardinal de Luca, *Theatrum Justitiae*, 1689—95, of Targa, *Ponderazioni Maritime*, 1692, and of Casaregi, *Discursus legales de Commercio*, the rules of Maritime international law, both during peace and war, as collected and pretty full detailed in the *Consolato del Mare*,

continued to be observed in that part of Europe, throughout the 17th century, unless where altered or modified by special convention or treaty, binding, of course, on the contracting parties, but on them only.

SPAIN.

Pretty much the same observation is applicable to Spain, during the 17th century, so far as appears from the *Trattado sobre las Presas Maritimas* of the Chevalier d'Abreu, to be afterwards more fully noticed. By the laws established in the 13th and 14th centuries, for the regulation of the *Armemens en Course*, or privateering expeditions from the ports of Aragon and Castile, the effects of the enemy, although on board neutral vessels, were held liable to capture as prize. But M. Martens informs us, in his *Cours Diplomatique*, Tom. III. p. 168, that, after the example of the other powers, Spain, in the 17th century, recognized the principles that neutral commerce is free in time of war, that warlike stores alone are contraband, and that the vessel covers or confiscates the cargo; and sanctioned these principles by its own laws, and a number of treaties with foreign powers. In making this statement, however, which is certainly too broad, Martens appears to have allowed his theory and zeal in favour of neutral claims to carry him too far. For the Spanish jurist just alluded to, the Chevalier d'Abreu, in chapter IX. of his *Trattado sobre las Presas*, lays down the doctrine, and supports it by the *Consolato del Mare*, by Salcedo de Contrabando, cap. 7, No. 16, and other Spanish authorities, that merchandise belonging to the enemy is lawful prize, on board of whatever vessels it may be found. Indeed, D'Abreu expressly mentions, that by the form of the patent or letters of marque, granted by the infant Don Philip, in virtue of the power delegated to him by his

majesty, it was permitted to the captains of privateers, to pursue or chase, without distinction, to attack, to take and seize the vessels and the effects which they might find belonging to the enemies of the crown, without the necessity, under which they might first be, of stopping a friendly vessel, of boarding her, and of making her lower her sails, being deemed any obstacle to the capture. Nay, D'Abreu goes on to state, that the general rule he has just established, suffers two exceptions. The first is, that if the goods belonging to the enemy are hypothecated, for whatever cause it may be, in favour of the captain of the friendly vessel which carries them, they cannot be legitimately seized. The second exception rests upon particular conventions and treaties, and regards hostile merchandise, on board of French or Dutch vessels, and not on board those of other states, with which Spain has not made the same convention. And the two treaties here referred to, were the treaty of navigation and commerce made at the Hague with the Dutch in 1650, and the treaty of the Pyrenees with France in 1659. Nay, farther, in the same chapter, D'Abreu proceeds to state, that (with the exception of French and Dutch vessels, under the particular treaties just referred to), even the vessels loaded with goods belonging to the enemy, are lawful prize; and he supports this position by references to various Spanish authorities. Bobadilla, Lib. 4, Politicor. cap. 5, No. 51, Salcedo de Contrabando, cap. 16, No. 4. So much for the international Maritime law of Spain during the 17th century. We shall return to the same national authority, when we come to the 18th century.

FRANCE.

It was not till the 17th century, that the Maritime foreign commerce of France became considerable, under

the fostering administrations of Fouquet and Colbert. But in the course of that century, the ambition of Louis XIV. supported by the genius of the latter statesman, raised the military marine of France to an unprecedented height. And in 1681, there appeared the celebrated *ordonnance de la marine*, which contained the rules by which, after mature deliberation, the French government resolved to administer the Maritime law of nations to other states; and thereby, on the principle of reciprocity, virtually became bound to submit to a similar administration of that law, in relation to themselves. The part of this *ordonnance* which contains Maritime jurisprudence, or the internal private Maritime and commercial law of France, is admitted on all hands to be excellent. And the part which embraces Maritime international law, properly so called, is likewise well arranged, and cannot be denied to be a fair specimen of legislation.

In the interval which elapsed, between the *ordonnance* of 1584, before noticed, and the *ordonnance* of 1681, or rather in the course of the 17th century, from 1638 to 1699, various *ordonnances*, declarations, edicts, *reglemens*, and *Arrêts du Conseil des Prises* were promulgated, and *Jugemens de l'Amiral* were pronounced, as printed in the second vol. of the *Traité des Prises*, by that distinguished lawyer, M. Valin. But these enactments related chiefly to questions of prize law between French subjects; and those subsequent to the *ordonnance de la marine* of 1681, did not derogate from the general doctrines of that celebrated *ordonnance*, which, with two important exceptions, may be considered as a fair exposition of the Maritime international law of Europe, towards the close of the century we are now surveying. For, as observed by Sir Chr. Robinson, *Coll. Marit.* p. 105, "The regulations of the French code

form an important object in the general system of prize law, on account of the great part which that nation has always taken in the affairs of Europe. They are worthy of attention, also, as being, in many instances, but declaratory of general principles, which have been incorporated into temporary edicts, from the usages and customs of the sea. So far, they are good evidence of such usages." For these reasons, it may be proper here to notice somewhat in detail, the leading regulations of the ordonnance of 1681, contained in the *Titre des Prises*, as illustrated in the learned and able commentary of M. Valin.

SEMONCE, VISITATION AND SEARCH.

In conformity with the ordonnance of 1584, the ordonnance of 1681 imposed, or at least expressly recognized, the obligation on allies and neutrals to obey the *Semonce*, or *Coup d'assurance*, the summons or requisition given by an armed French vessel, with a commission of war, and under the national flag, to stop, for the purpose of ascertaining, whether the vessel so sailing on the high seas, and cargo, were the property of the enemy, or not; and whether the goods on board, though neutral property, were contraband of war; and declared that the vessel which should refuse to lower her sails, might be compelled to do so by artillery, and in case of resistance and combat, should be held lawful prize, nay, even without combat, if the resistance was pushed too far; but that, if the vessel obeyed the summons, and the regular ship's papers were found on board, the friendly or neutral vessel should be immediately released. The passport of the king was declared to exempt from capture. The capture was held illegal, if made in a river, even in the country of the enemy, or in a port, or under the cannon of a fortress of a friendly or neutral power.

The capture was held valid, if made during the periods usually stipulated and allowed in treaties of peace, unless it could be proved that the captor was previously aware of the actual conclusion of the peace.

NEUTRAL COMMERCE GENERALLY.

As it would not be just, says Valin, that the subjects of a friendly or neutral power should be deprived of the right of continuing their commerce, either in general, or with either of the nations at war, it has been stipulated in all treaties, relative to the law of nations, that they might carry on their commerce freely, without the danger of being captured. But, on the other hand, seeing they might have deviated from the laws of neutrality, by favouring one of the belligerent powers to the prejudice of the other, their navigation and commerce have been placed under certain rules and forms, of which the non-observance, rendering them justly suspected, subjects them to seizure, and to being declared good prize, in the same way as the vessels of the enemy. Such neutral vessels must have a commission or passport from a sovereign, prince, or state, called *Lettre de Mer*, which must be for the actual voyage, and must not have been contravened; and the vessel must sail from one of the ports of the sovereign by whom the commission has been granted. Every vessel fighting under another flag, than that of the state from which it has the commission, or having commissions from two different sovereigns, is lawful prize.

PROOF OF NEUTRAL PROPERTY.

The property of a vessel pretending to be neutral, must be proved by the production of the deed of ownership, such as the bill of sale, or vendition, if of the construction, or built of the enemy.

Neutral and other vessels, whose masters or crews throw their ship's papers into the sea, or on board of which there are found no charter-parties, bills of lading, manifests, or other ordinary ship's papers, are lawful prize.

EFFECTS GIVEN TO HOSTILE VESSELS AND GOODS.

Goods belonging to the enemy, render the vessel which carries them hostile; and reciprocally, a vessel belonging to the enemy, renders all its cargo hostile; so that in either case, the whole is subject to confiscation, without distinction, whether the goods belong to Frenchmen or allies.

"This principle," says Sir Chr. Robinson,* "introduced apparently for the first time by the ordonnance of 1543, this principle of confiscating a neutral ship for having on board the merchandise of an enemy, is a direct departure from the old practice, as recorded in the *Consolato del Mare*. The terms used are confined to 'the ships of subjects.' But the tenor of the whole article refers equally to the property of other confederates and allies; and the interpretation put upon it in practice, seems to have applied it to all neutral ships. Such an innovation is stated to have become necessary, for the purpose of encouraging French cruizers, and relieving them from the difficulties which they had to encounter, in consequence of concealed interests and covering claims. Such reasons will scarcely be deemed sufficient grounds for an alteration in the general system of public laws, so injurious to neutral trade."

"It seems to have been for a long time doubted, whether this regulation did, in fact, become the actual law of France; or whether it was for a century after its promulgation, ever enforced. Sir Leoline Jenkins hav-

* Coll. Marit. p. 119, 120, 121.

ing occasion to speak of this article, in discussing the case of a ship condemned in France, says of it, there are several things of moment, as I conceive, that may be said to show that that article ought not to obtain in this case; first, that article has been complained of, and written against, by public ministers and learned men, upon the first publishing it, as an encroachment and violation of the natural freedom of commerce. The direct contrary has been adjudged in the case of a free *Hamburgher*, surprised with unfree goods on board it, by a solemn decision of the parliament of Paris, 1592. And this article was then declared, in the sentence itself, to be abrogated by disuse, the first publishing thereof being under Francis I. 1543, having never obtained in judicial determination for these forty-nine years, and the design of first publishing it being only in *terrorem*. It has been moderated with several restrictions, by the last and present most christian kings, in their several edicts, viz. 19th December, 1639, 15th January, 1645, 21st January, 1650, and by another *ordonnance*, 1st February of the same year, it is expressly provided, that in prizes taken and to be taken by French commissions, the goods of enemies only shall be maintained, and made prize; but the other goods and ships that carry both, if they belong to friends, shall be discharged. 10th November, 1668, *Life of Sir Leoline Jenkins*, vol. II. p. 726. Whatever (resumes Sir Chr. Robinson), may have been the decision of the parliament of Paris, on which the statesmen and civilians of other countries relied, in 1668, it is certain, that the government of France expressly retained that article in the general revision of their marine laws, in the *ordonnance* of 1681. And it appears, during the latter part of that century, to have been considered as the standing law of France, with an exception in favour of some particular countries."

To the same effect, Valin, in 1763, observed, *Par rapport aux effets des ennemis, chargés dans un navire neutre, il sembloit resulter, de l'art. 42, de l'ordonnance de 1543, et du 69 de celle de 1584, qu'il n'y avoit, que les effets ennemis, qui fussent sujets à confiscation, sans y envelopper le navire, et le reste de son chargement; du moins c'est ainsi, que Cleirac avoit interprété ces deux ordonnances, dans son traité de la juridiction de la marine, art. 25, p. 443.

Mais aux termes de notre art. 7, tout est soumis à la confiscation, sans distinguer, si le navire a été chargé en entier, ou par la plus grande partie, d'effets, appartenans aux ennemis, ou s'il ne l'a été, que pour une petite partie; parce que, de maniere, ou d'autre, c'est favoriser le commerce de l'ennemi, et faciliter le transport de ses denrées et marchandises; ce qui ne peut s'accorder, avec les traités d'alliance, ou de neutralité; encore moins convenir aux sujets du Roi, aux quels toute communication avec l'ennemi, est étroitement défendue, sur peine même de la vie. Et ce qui ne permet pas, de douter, que ce ne soit là, le sens de la premiere partie de notre article, c'est la disposition de l'arrêt du Conseil, du 26th Octobre, 1692, et de l'article 5, du Reglement du 23, Juillet 1704, qui porte en termes formels, que s'il si trouve sur les vaisseaux neutres, des effets appartenans aux ennemis de sa majesté, les vaisseaux, et tout le chargement seront de bonne prise, conformément au dit article 7, de l'ordonnance de la marine.

HOSTILE VESSELS, ASYLUM.

It is agreeable to the law of nations to give an asylum in a port to every vessel which the tempest or stress of weather oblige to take refuge in it, whether friend or foe. But the laws of war permit the seizure and con-

* Traité des Prises, Tom. I. p. 62.

fiscation of the hostile vessel, in the asylum to which it has resorted, to avoid shipwreck. The complete asylum is due only to friends or neutrals. And as neutrality, in relation to the powers at war, does not admit of any favour being shown to the one, to the prejudice of the other, in order to reconcile this impartiality with the right of asylum, nations, observes Valin, have tacitly agreed, and usage has made it a rule of the common law, that an asylum should be granted to foreign ships of war, with their prizes; that have been forced by the tempest to enter a port, only so long as the bad weather, or the bad state of the vessels, shall not permit them again to put to sea. And the dread of re-capture affords no sufficient reason for continuing the asylum beyond the ordinary time.

CONTRABAND OF WAR.

From time immemorial, says Valin, arms, guns, gunpowder, cannon-balls, and other warlike stores, have, by the laws of nations, been held liable to confiscation, in whatever ship they might be found, if destined for the enemy; grain, provisions, or victuals, only if destined for a blockaded port; also, pitch and tar, except in Swedish vessels; also, horses and their accoutrements, but not so as to affect the vessel. Such contraband goods are liable to confiscation, only when transported for the service of the enemy; and excepting these, neutrals might carry all other goods to the enemy.

Re-capture is valid, in toto, after the lapse of twenty-four hours in the possession of the enemy—but only to the extent of one-third, if within that period.

This was an alteration of the old rule, which required the prize to have been brought *infra praesidia*, and was attended with difficulty; and the change was introduced for the encouragement of captors. This

rule was observed with regard to allies and confederates, as well as Frenchmen; but not as to neutrals, if the neutral vessel had been legally captured for breach of neutrality by the enemy.

DUTIES OF THE CAPTOR.

The captains of privateers were required to carry or send their prizes to the ports where the vessels were fitted out, unless stress of weather obliged them to take refuge in another port; in which case, they might carry or send their prize to the nearest port of the kingdom they could reach; or even to a neutral port. They were prohibited from concealing or carrying off their prizes, or leaving them at sea. If they could not preserve, they were required to burn or ransom their prizes; but behaved to take certain precautions, and bring home the ship's papers and principal officers. And the power to ransom the effects, active and passive, and the taking of a hostage, along with the ransom bill, were all specially regulated; the pillage of prizes prohibited, and penalties attached.

The following procedure was prescribed, in relation to prizes, before they were adjudicated. Declaration of the captain before the officers of the admiralty; steps to be taken by the officers of the admiralty, after information of the prize; interrogation of the captain or master of the vessel captured, and of his crew; when the vessel was brought in without prisoners, suspicion arose, and farther investigation ordered; when it was not practicable to ascertain from whom the vessel had been captured, the prize to be considered as sea-wreck; provisional discharge of the cargoes of prizes; provisional sale of prize vessels and goods.

ADJUDICATION AND DIVISION OF PRIZES.

In France, in early times, prizes were adjudicated by the officers of the admiralty. The inconvenience, delay, and expense of appeals, led to the exclusive power of adjudicating prizes being vested in the admiral himself. And, after some changes of minor importance, in consequence of the number of appeals from the admiral, a council of prizes was established in 1659, and finally confirmed in 1695, composed of councillors of state, and *Maitres des Requêtes*, who assembled with the admiral, to hold "*le Conseil des Prises*," and to judge of them in the same way as concerning the wrecks of hostile vessels, to the exclusion of all other judges, so that the judgment pronounced might be executed under the provision of security being found by the party interested; under the reservation of an appeal to the *Conseil d'etat du Roi*, and afterwards to the *Conseil Royal des Finances*. The necessary pieces were directed to be prepared for the "*instruction*," or proof of the prize, separately for each prize. And, seeing all vessels, during war, were reputed hostile, or pretended neutral, (*masqués*), it belonged to the *Conseil des Prises* to decide upon the fate of vessels wrecked and thrown on shore during that period. All prizes captured from neutrals, as from enemies, required to be judged of by the *Conseil des Prises*; and the same in the case of shipwreck.

Among other nations, says Valin,* there is every where, in the same way, a tribunal for there judging of the prizes which are brought into their ports; so that this is an universally established usage, against which no power had hitherto remonstrated.

Of neutral prizes carried into the port of a power likewise neutral, but other than the neutral power or

* *Traité des Prises*, I. p. 233.

government, the vessels or goods of whose subjects have been captured, such a power was held not entitled to take cognizance. When such a prize entered a hostile port, if a lawful prize, it was a re-capture; if not, it was restored to the neutral owner.

There was no right to restitution of effects loaded in a hostile vessel, for whomsoever the claim might be made; nor on the part of the enemy, in the case of a friendly vessel, unless he had the license of the king. The capture might be declared illegal, without there being ground for a claim of damages and expenses. To found such a claim, the capture behoved to be manifestly illegal. There were held to be expenses, which the claimants behoved to bear, even although they succeeded in their claim.

Judgments in prize causes were directed to be executed without delay, unless there was an appeal; in which event, security was required to be given.

Anciently the division of prizes was made in specie; in later times, all ship and cargo were directed to be sold, so as to liquidate the proceeds for division. Preferences were recognized on the proceeds of prizes. There was a form of liquidation, according as the capture was made by a government vessel, or by a privateer. And there were special regulations for the division of prizes, between the individuals interested in the armament, and the crew of the armed vessel; and in the case of a co-partnership in the fitting out of the privateer.

Such is the substance of the French ordonnances and reglemens of the 17th century, particularly of the celebrated ordonnance de la marine of 1681, so far as regards prize law; such the administration by France during that century, of Maritime international law during war. And it is but justice to observe, that this

ordonnance, and the administration under it, are, in the great majority of rules and cases, in conformity with the natural and common consuetudinary law of nations, and declaratory of the principles previously recognized by the European nations. The chief, if not the only deviations from that law and these principles, are the confiscation of neutral goods, though proved to be such, in consequence of their being found on board hostile vessels, or, although merely along with hostile goods, in neutral vessels; and of neutral vessels, in consequence of their carrying hostile goods. And with these, no doubt, important exceptions, the ordonnance of Louis XIV. appears to be an able declaratory exposition of the common Maritime international law of Europe.

ENGLAND.

The administration by England of Maritime international law during war, in the course of the 17th century, does not appear to have differed materially from that of the continental nations in general, excepting always the more severe practice of Spain and France, in confiscating neutral goods, from their being on board hostile vessels, and neutral vessels, from their carrying hostile goods. At the commencement of that century, a long conference and discussion took place on various points of that law, between commissioners appointed on the part of Queen Elizabeth of England, and of King Henry IV. of France; but was adjourned without coming to any agreement on the various articles which formed the subject of their deliberations.* “The negotiation, (says Sir Chr. Robinson),† was broken off; and although

* The propositiones inter commissarios hinc inde agitatae, were preserved in Winw. Mem. vol. I. p. 392, and were published in the Coll. Marit. 35, 53.

† Coll. Marit. p. 43, 44.

we are not told what the particular articles were, on which the commissioners disagreed, we may infer from other quarters, that one was the article of exemption from search; since in the next year, 6th January, 1603, the French ambassador was again very urgent for the establishment of such a rule. It was then proposed by him, 'that the French flag should prevent visitation and search; that all prize causes should be determined within a certain time; that the merchant claimants of France should not be required to bring proof on their part of the property of their claims, but that the proof should lie on the captors.' The answer on the part of the English government was, 'that France did always insist on the right of visitation in their wars; that Spain would still insist upon it; that under colour of the French flag, all sorts of goods would be covered; and that other nations had been found to avail themselves of it.' It farther stated the exertions that had been made, to guard against all acts of robbery and piracy on the part of English subjects, and that thirty-nine pirates had actually been executed within a few years; in respect to the mode of proof insisted on, it replied, that the judge should determine, within a specified time, on the evidence of the ship's papers; and that if the master, or any of the crew, were convicted of a spoliation of papers, by destroying or throwing them over board, it should be held to be a ground of condemnation, according to ordinances and customs of France."

It may be right, also, here to subjoin Sir Chr. Robinson's correction of the inaccurate account given by Grotius and his translator, Barbeyrac, of the transactions between England and France just alluded to. "The words of Grotius are, '*Galli vero post pacem Verbiniensem cum Hispano factam, Elizabethâ Angliæ Reginâ, in bello perstante, rogati ab Anglis, ut Naves Gallicas in*

Hispaniam euntes, excutere liceret, ne quis forte bellicus paratus occultaretur, concedere ne hoc quidem voluere, dicentes obtentum rapinis et commerciis turbandis quaeri.' De jure Belli et Pacis, Lib. III. cap. 1. § 6, n. 6. In Barbeyrac's translation it is thus expressed, 'Après la paix de Vervins, la Reine Elizabeth, continuant la guerre, pria le Roi de France, de permettre, qu'elle fit visiter, les vaisseaux François, qui alloient en Espagne, pour savoir, s'ils n'y portoient point de munitions de guerre cachées; mais on le refusa, par la raison, que ce seroit une occasion de favoriser le pillage, et de troubler le commerce.' From these terms, it might be supposed the solicitation had been on the side of England, and that the prayer to be exempted from a general rule had proceeded from Queen Elizabeth. But the correspondence with the English ambassador at Paris, at that time, states the matter in a different light. It is represented by Cecil, as an exception granted out of respect to the French king, and on a promise made on his part, that he would not suffer corn to be carried to Spain, if an army were making. And in this light, the English ambassador was directed to represent it to Henry IV. of France; as it appears he did, by the following passage. 'Thirdly, I said, her majesty did likewise assure herself, upon the promise made by his ambassador, that this great liberty which she had granted to his subjects, to pass unsearched and uncontrolled into Spain, or any other place, should not be converted by them to her prejudice, either by colouring the Spaniards, or other her enemies' goods, or by transporting into Spain, or other that king's dominion, arms, munitions, or other instruments or materials of war, either by land or sea; whereof, I said, she had given me charge to make special instance unto him, that some speedy order might be made for her assurance, as a matter which

might be otherwise very prejudicial to her estate, and might give her occasion to repent of her former resolution.' Again, 'that when her majesty assented to make the aforesaid proclamation, she did foresee that it might be very prejudicial unto her; yet upon the confidence of his affection and true friendship towards her, and upon a promise made by his ambassador in his name, that in times of suspicion, when the king might be thought to intend or prepare any hostility against her majesty, he would be pleased to take order, to restrain the carriage of corn by his subjects into Spain, her majesty had been content to pass over all difficulties, and to resolve to grant that liberty.' That she intended not to give that liberty to any nation, as she did to his subjects, because she had not that confidence in any, that she had in him." May, 1599, Winwood's Mem. vol. I. p. 19, 22, and 23.

"So soon as July following, it appears that the abuses necessarily incident to such exemptions, had made Queen Elizabeth resolve to retract the indulgence she had granted. It is stated by her ambassador to the king of France, 'that she was well content to annex, and to incorporate into the treaty, such articles as had been moved to be established, for reformation of abuses at sea; only she desired him to allow some alteration in one of them, which concerned the free passage of all ships carrying French flags; wherein she had already found great inconveniency, as I particularly rehearsed unto him, of the four Spanish ships which escaped by that means, and of the two Biscainers which brought succours to the rebels in Ireland; and therefore desired that some other expedient might be thought of, which might effect his purpose and desire, without such notable prejudice to her estate, and benefit to her enemies.' p. 76. In the preceding letter from Secretary Cecil, to

the ambassador, it is said, 'that the liberty given to all ships to pass freely that shall carry the banner of France, is of too great prejudice unto her; and therefore, that her majesty, upon better knowledge of the abuse thereof, cannot allow of that toleration.' These passages sufficiently point out to us, (continues Dr. Robinson), the article on which the commissioners in 1602, could not come to any agreement; they teach us to receive with some qualification, those expressions of Grotius, which seem to represent the opposition made by Henry IV. to the exercise of search, as a vindication of an acknowledged right on his part, peremptory in its terms, and effectual; whereas, the temporary concession yielded on this point, appears to have been considered on the other side as a relaxation of an established right; an experiment, as it is termed, allowed for a time, out of respect to Henry IV. of France, with whom Queen Elizabeth and James I. cultivated a particular friendship—not as a person feared by them, but as a friend, by whose loss this state did suffer much, for the good and fast friendship which the king had always borne unto it, standing in the breach, and like a rampier against all conspirations and dangers, which were threatened and hatched against them here, which, by his continual watchfulness and good affection, he did always seek to disclose and put by. On this view of the matter, the whole of this exception is to be considered as a temporary indulgence, of which Queen Elizabeth soon repented; as a trial of a principle, which, after experiencing its effects, she refused to incorporate into a treaty." *Coll. Marit.* p. 47, 48, 49, 50. And the fact is, that this exception was peremptorily resisted on the part of England in 1602; and that in 1606, a treaty was executed between the two countries, in which this matter was entirely omitted. Indeed, it is not easy to see, upon what legal ground

France could then urge the adoption of such a rule, when, as we have seen, her own practice had been the reverse from time immemorial.

But although the negotiation, before mentioned, was broken off, and although the conference between the commissioners did not then lead to the conclusion of any treaty with King Henry IV. of France, Queen Elizabeth, in 1602, issued a *Proclamatio Regia*, ad reprimendas *Depraedationes super mare*, directed chiefly against pirates, by whom the seas were then grievously infested, but providing also for the better regulation of various matters connected with legitimate capture, *Jure Belli Publici*. The following are the chief of these provisions. That ships of war should not go out to sea without license from the admiralty; that in the ships of friends, goods should not be seized, unless belonging to enemies, or contraband; that admiralty causes should be heard summarily; that in causes of depredation, on appeal, the sum adjudged should be paid, upon sureties to repay it; and no prohibition should be issued in such causes; that no prize be disposed of before adjudication; that the vice-admirals at each port should take the custody of prize goods; that the bonds required from armed vessels should be taken by the judge of the admiralty only; that no ship or goods taken from any friendly nation, should be delivered, except on proof before the court of admiralty; that proceedings should be instituted in case of any ship of war going to sea without license, and against any persons who have sold or alienated any ship or goods whatsoever taken at sea, before judgment, as aforesaid; that each vice-admiral should transmit certificates to the court of admiralty, of ships going to sea, or returning home; that no owners or masters of English ships of war, should sell, alienate, or dispose of any goods captured at sea, elsewhere than within the king-

dom of England. Rym. Foed. vol. XVI. p. 436, Coll. Marit. p. 21—34.

In point of time, it may here be mentioned, that Albericus Gentilis, whom we formerly noticed at some length, as the great international lawyer of the 16th century, and as having lived in the reign of Elizabeth, survived that reign; and after the peace which King James I. concluded with Philip II. of Spain, assisted in adjudicating many questions of importance in Maritime international law, between the Spaniards and the Dutch, so far recorded in his *Advocatio Hispanica*, published by his brother.

In 1625, King Charles I. issued a proclamation, declaring that all ships carrying corn, or other victuals, or any munition of war, to or for the king of Spain, or any of his subjects, should be deemed lawful prize. This was agreeable to the practice of belligerent states in very early times, of preventing supplies of provisions, munitions, &c. from going to their enemies. An article to that effect is to be found in various treaties. And discussions on questions of contraband, seem not unfrequently, to have turned on the words of this article in different treaties. Coll. Marit. 54—62.

In the following year, 1626, King Charles I. issued a farther proclamation to foreign states, respecting contraband of war, giving notification, so as at least to remove all pretext of ignorance, enumerating the articles of contraband, viz. ordnance, arms of all sorts, powder, shot, all kinds of naval stores, corn, grain and victuals of all sorts; and declaring that all vessels sailing towards any of the king of Spain's dominions, having on board any of the enumerated articles, or returning thence on the same voyage, with the proceeds of the contraband goods, should, both ships and cargoes, be taken as lawful prize. Rym. Foed. vol. XVIII. p. 856. The rule here

announced, of making the proceeds of contraband goods on a return voyage, liable to confiscation, appears to have been acted upon in 1644, by the parliament of England, in a question with Holland. But a different practice has since prevailed in the English courts of admiralty, under which, in ordinary European voyages, the penalty of carrying contraband has not been considered to attach on the return voyage. Coll. Mar. p. 66, 67.

Both these proclamations, however, so far as they declared liable to confiscation, goods belonging to neutrals, which were not contraband of war by treaty, or at common law, from their nature or adaptation, or special destination for hostile ports, of naval equipment, or other military Maritime operation, were a departure from the genuine principles of international law.

In the course of the same year, 1626, King Charles I. also granted a commission to privy councillors, Dudley, Lord Carleton, Sir John Coke, one of the principal secretaries of state, Sir Julius Caesar, master of the rolls, Sir Henry Martin, judge of the court of admiralty, and certain other persons, doctors of the civil law, including Dr. Richard Zouch, with instructions to review the principles of prize law. In this commission, the king directed the commissioners "to inquire, discover, and find out all such doubtful causes, as have, or may happen, about reprisals at sea, and to take into your consideration, what you understand to be law in such cases, and what is therein practised by other nations, with whom we have either alliance, or are upon terms of hostility; and thereupon, to propound unto us such a course, to be hereafter observed herein, as may be most expedient for the due and speedy execution of justice, and the giving satisfaction both to our own subjects and strangers, the maintenance of peace and good correspondence with our friends and allies." The commission

farther granted power to the commissioners to search records, and "to confer with the merchants, strangers, and others, of this our realm, in and about the premises, for your better information therein." Rym. Foed. vol. XVIII. p. 731. What report was made by these commissioners, does not appear, which is much to be regretted.

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Thus the treaty, which was concluded between England and France in 1632, which, while it purports to be a treaty of commerce generally, is confined almost entirely to the regulation of the exercise of search, and other matters of prize law, distinctly recognizes, and shows beyond dispute, that the right of search was effectually established between the two nations at that time, without any reference to claims of exemption on either side. Art. III. Et d' autant, que sous pretexte de recherche et visite, qui se pourroient faire, par les vaisseaux de guerre, de l' un, ou de l' autre prince, ou de leurs sujets, en mer, des navires marchands, pour scavoir, s' ils sont chargéz de marchandises defendues, et appartenantes aux ennemis, il s' est commis par le passé, plusieurs outrages, qui ont, sans cause legitime, empêché la route des dites navires, et fait souffrir d' autres grands dommages aux marchands, pour obvier a tels

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The energy of the Protector, Cromwell, it is well known, caused the nation to be respected at sea, and even feared by foreign nations, during the short period of his dominion. And he had the wisdom to exercise the unquestionably legitimate rights of the nation, for the promotion of its Maritime commerce and naval power, by originating that celebrated navigation act, which, with certain modifications, has been continued in force ever since, and has, at later periods, been imitated by other nations.

In 1649, an ordinance of the commonwealth directed, "that in all prizes taken from the enemies of the commonwealth, a moiety should be given up to the captors, and that the other moiety should be deposited in the hands of the treasurer of the admiralty, to raise a fund for charitable purposes, rewards," &c. And for all enemy's ships of war burnt, sunk, or destroyed, there were to be paid sums varying from £10 to £20 per gun. Coll. Marit. p. 192.

In 1653, Queen Christina of Sweden attempted, by a proclamation, to protect warlike stores on board of Swedish merchant vessels from search and detection, as contraband, by means of government ships of war, to be sent as a convoy to fleets of such vessels. But the English commonwealth appears to have resisted this attempt, although Sweden was then favourably disposed to England, and although the convoy was to protect Swedish commerce only, and not to screen any ship or goods belonging to the belligerents. And the scheme seems to have been abandoned. Tum et, quod Regina

stapulam mercium bellicarum Gothoburgi struere agitare, quo, et pars navium bellicarum deducenda erat, istis mercibus, per naves Suecias e mari Baltico, huc comportatis, post ad portus Flandriae, et imprimis Dunquercam vehendis, praesidio futura; quibus et Hispani modicam classem facile addituri credebantur. Ita Anglis uberem ejusmodi mercium copiam fore, ac Daniae Regem frustra, tam lautis conditionibus adductum, ut Anglis sua freta clauderet. Omittebat tamen id consilium, onerarias naves bellicis conducendi. Regina, quod pax brevi inter bellantes coitura videretur, ac ne forte, hac occasione, invita in bellum traheretur, si Angli, aut Hollandi, navarchi, Suecias naves excutere auderent, Suecisque navarchis id abnuentibus, ad manus, uti solet, esset perventum. Jaciebat etiam de consilio, Regina naves bellicas Gothoburgum mittendi, quae onerariis Suecorum in Flandriam, et alio trajicientibus, praesidio essent. Super quo, nihil certi responsi, ab Anglis, elici poterat. Pufendorff *Rer. Suec. B. XXV. § 41, 46. Coll. Marit. p. 145, 6.*

In 1655, the scheme of preventing search for enemy's property and contraband goods, was likewise taken up by Holland. "They have a design to hinder the Protector all visitation and search; and this by very strong and sufficient convoy. And by this means they will draw all trade to themselves and their ships." *Thurloe's State Papers, vol. IV. p. 203. Rob. Adm. Rep. I. p. 366.* And in 1656, De Ruyter, in consequence of his having a more powerful squadron, actually succeeded in convoying from Cadiz to Zealand, a fleet carrying large quantities of gold and silver coin and plate, for the use of the armies in Flanders of the king of Spain, who was then at war with England. But the Protector, Cromwell, directed the ships of war to persist in searching Dutch vessels, which "have on board bullion and other goods,

belonging to the Spaniard, the declared enemy of this state, as agreeable both to the law of nations, and the particular treaties between this Commonwealth and the United Provinces." And in the disputes between England and Holland in 1657, while the States struggled hard to obtain the recognition of the exemption of merchant vessels from search for contraband, or enemy's property, by means of an armed government vessel in the character of convoy, as a legal right, the then government of England as pertinaciously refused to admit it, as a principle of law, or even to sanction the practice under an article of treaty. Coll. Marit. p. 146.

In 1661, there was published by John Godolphin, LL.D. "A view of the Admiral Jurisdiction." But this treatise, overloaded with civil, or Roman law learning, is almost entirely occupied with the internal constitution of the English court of admiralty, as distinguished from the English courts of common law and equity, and only to a small extent with private Maritime jurisprudence, and contains little or nothing of Maritime international law. Indeed, the chief, if not only, things to be remarked of this publication, with regard to the subject of these researches, are, the reference it makes to the Consolato del Mare, as deemed at that time a source or authority in the Maritime law of England, and its appendix, being an "Extract from the ancient laws of Oleron, rendered into English out of Garcias, alias Ferrand."

In 1664, John Exton also published his learned work, entitled, "The Maritime Dicacology, or Sea Jurisdiction of England."

In the reign of Charles II. Maritime international law underwent a good deal of discussion, chiefly in questions with the French and Dutch. And Sir Leoline Jenkins distinguished himself by his great learning

and ability, as an international jurist generally, as well as judge of the high court of admiralty. Indeed, the want of professional reports of the cases decided in these times in the high court of admiralty, and prize appeal court of England, is in some measure supplied by the very judicious reports and letters which, in the interval between 1663 and 1680, Sir Leoline was called upon to address to King Charles II. and his privy council, and to the lords commissioners of prizes. In these reports and letters, various points of Maritime international law were discussed and expounded with the simplicity and clearness which distinguish higher talent, and the views taken were impartial and equitable. The manuscripts well merited depositions in Doctors Commons, under royal authority; and the nation is much indebted to Mr. Wynne for the publication of them, along with a life of the author, in 1724, in two vols. folio. It may be sufficient to notice a few points, which appear to have been ruled agreeably to Sir Leoline's advice. Vol. II. p. 698—780.

"A natural born subject cannot, upon any pretence, throw off his allegiance. The ceremony of striking the flag is dependent on usage, and must have the legal requisites of prescription beyond the memory of man. By the usage of European nations, every man is justiciable (amenable) to justice, where the crime is committed. The law distinguishes between a pirate having no commission, or else two or three, and a lawful privateer, that exceeds the terms of his commission. Protection must be afforded against capture, or other violence in or near the harbours, ports, or coasts, in what were then called the king's chambers, or within the *jus littoris*, or what has been called the territorial sea."

"The question in law is, p. 732, whether this Biscainer, being brought into your majesty's port, ought not, upon

the account of your majesty being in amity with the catholic king, to be rescued from under the power and force of his enemy, and jure postliminii, to be restored to his owner. The law of nations, as it is this day observed, seems not to pass any obligation upon your majesty to impart your royal protection unto one friend, to the prejudice of another. This captain, being jure belli, which is a very legal title, in full and quiet possession of his prize, will take it for an act of partiality, to have it now wrested out of his hands, and given to his enemies. Whereas no man's condition is to be made worse than another's, in a place that is reputed of common security, upon the public faith. Upon the general law, and whatever became of the Biscainer, the English goods on board might, and ought to be taken, and restored to the owners."

"In the case of a ship otherwise free, as belonging to some of his majesty's allies, having carried goods belonging to his majesty's enemies, from one enemy's port to another, and being seized after it had discharged the said goods, laden with the proceeds of that freight which it had earned and received of the enemy, upon the account of the ship's owners, Sir Leoline did not know anything in the laws and customs of the sea that could, supposing the property of the said proceeds to be bona fide vested in the ship's owners, his majesty's allies, give sufficient grounds for condemnation as prize."

"A French vessel, p. 744, captured by a Dutch privateer, and re-captured by an English frigate, after having been six days in the enemy's possession, not restored upon salvage, because, by the law of France, French subjects indeed have restitution upon salvage, although the ship have been several days or months in the enemy's hands, but their allies must be rescued within twenty-four hours, otherwise they are adjudged good prize to the rescuer."

"The king's exchequer, p. 749, not liable to indemnify an ally damaged by an English private man-of-war, because a bond of security had been taken from the privateer in terms of the treaty with Sweden; which bond, though taken in Scotland, then a separate state, was available against the sureties living in England."

"By the general law of nations, p. 751, nothing to be judged contraband in this case, (if not made unfree, by being found in an unfree bottom), but what is directly and immediately subservient to the uses of war, except in the case of besieged places, or of a general notification to all the world. A neuter prince ought not, in favour of one friend, p. 750, to make the condition of another friend who has come into his ports, worse than it was when he came in, by any thing done by his authority, farther than his obligation by treaty with the one or the other friend ties him. I do not conceive that the suggestion in the memorial, viz. that the vessel captured from the Dutch had not yet been in any port of France, nor legally adjudged to the captor, doth concern your lordships or his majesty, since his majesty is no farther judge between them than the law of nations, the honour of his ports, and the due execution of his own treaties, constitute, or rather necessitate him to be in such cases."

"An English ship, p. 770, taken by an enemy, and some time in his possession, and then rescued by another English ship, ought not to be held prize, but to be restored to the proprietor on paying salvage. No droit de guerre between Englishmen."

"The English court of admiralty, p. 780, ought not to interfere in judging upon the validity or extent of foreign commissions, where the parties are both foreigners, both allies, and both at war. If this Frenchman has a commission, though of an older date than the war with

Hamburgh, there is no law to hinder him from carrying his prize whither he pleases. The law of nations permits him to bring his prize into an English port. By the same law, the king may drive him thence, if there be occasion to do so. But there is no law to stop or detain him, unless he has done something against the laws of England, or treaties, or English subjects be concerned in point of property, or have good cause of action against his person. If the Hamburgh prize was taken within the 'king's chambers,' as fixed by declaration, bound for one of his ports, it ought to be set free; notwithstanding, if taken on the high seas, it would have been a lawful prize; and the goods belonging to Englishmen to be taken out of the prize and restored."

"The king not bound, p. 733, to notice a treaty to which he is not a party. All treaties require first legal process in the law courts; then appeal to the prince or supreme power, before such a denial of justice can be stood upon, as is to be repaired by letters of marque or reprisals. For delays before the prince or council, there was no remedy, till, by modern treaties, the time was limited to three or four months; beyond which, no man is bound to wait for an answer," p. 759.

"As it is a certain rule in law, that no statute or constitution shall be interpreted to restrain and derogate from an ancient law or custom, universally received, farther than the words of such statute are express and decisive, so it is in treaties. They are not to be understood as altering or restraining the practice generally received, unless the words do fully and necessarily infer an alteration or restriction," p. 759.

But not only do these official letters and reports of Sir Leoline Jenkins show, how various important points in Maritime international law were in these times decided in England; they show also, the regular mode

announced, of making the proceeds of contraband goods on a return voyage, liable to confiscation, appears to have been acted upon in 1644, by the parliament of England, in a question with Holland. But a different practice has since prevailed in the English courts of admiralty, under which, in ordinary European voyages, the penalty of carrying contraband has not been considered to attach on the return voyage. Coll. Mar. p. 66, 67.

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prize courts, from the year 1667, to the year 1677, inclusive. For besides his treatise to be afterwards referred to, Lord Stair, and likewise Wedderburn, Lord Gosford, have reported a number of prize causes decided during that period, of which, in the absence of regular English prize law reports at that time, it may be worth while shortly to notice the substance.

July, 1667, Swedish neutral vessel condemned as being navigated by Dutch (hostile) sailors. Cargo condemned as contraband, in respect the treaty with Sweden did not warrant the carriage of contraband to the enemy, except the produce of that country. 14th January, 1668, the Swedish treaty, enumerating certain articles as contraband, did not warrant the carriage to the enemy of other goods contraband de Jure Communi.

23rd February, 1668, the captor liable in restitution, but not in damages, where there were probable grounds for seizure, and he acted *bonâ fide*.

30th June, 1668, and 17th July, 1673, vessel adjudged prize, because the crew on board consisted partly of enemies; because enemies were part-owners. But 16th July, 1673, found not sufficient ground for confiscation, that the master was a Dutchman (enemy), not being an owner of the vessel.

15th June, 1669, in prize causes, "competent and omitted," as being a particular custom of Scotland, not sustained against foreigners. 7th January, 1673, farther proof allowed to redargue adverse presumptions. 26th February, 1673, amid contrariety of documents, farther proof allowed.

13th July, 1669, Pass afforded effectual protection. 21st January, 1673, prize not enforced from the want of a pass with the formalities required by the previous treaty of 1667. 23rd January, 1673, adjudication as prize, because the pass did not specify the port of des-

tinuation. 19th February, 1673, the want of a pass, conform to the formula appointed by the treaty, throws the onus probandi on the owner of the ship taken. 21st February, 1673, where there is no treaty, and no formula of a pass appointed, yet the want of a pass upon oath, throws the onus probandi on the foreigners. 15th July, 1673, a ship found lawful prize, on account of the falsehood of the pass, and that the goods of enemies were found on board. 29th June, 1671, a ship adjudged prize, because the pass was factitious. 28th February, 1673, prize not sustained, because the pass bore not the port to which the ship was bound; it being proved that the ship and cargo belonged to neutrals. 28th February, 1673, prize sustained, because the ship wanted a pass, and the shipmaster acknowledged himself to be a Dutchman (enemy), and part-owner. 13th June, 1673, prize not sustained, because of the contrariety of two passes, or the suppression of that which, if expressed, would not make the ship prize. 17th June, 1673, sufficient ground of suspicion to warrant seizure; but allowed a proof, that ship and cargo belonged to neutrals.

11th February, 1673, although the goods were confiscated as belonging to enemies, the ship was freed, being neutral, and having received the goods *bonâ fide*, before the war was known. 22d July, 1673, ship found free, as being neutral, and the loading prize, as being hostile.

27th February, 1673, found that a ship taken on *return*, after carrying contraband, was *not* prize; that contraband itself only became prize, *si deprehendatur*.

28th February, 1673, prize not sustained, although it was proved by one witness, that papers were thrown overboard. 12th June, 1673, adjudged as prize, because the pass bore faith to have been made, whereas

the shipmaster acknowledged the contrary on oath, and because papers had been thrown overboard. On this occasion, the court laid down some general rules for the decision of prize cases.

10th July, 1673, and 23d July, 1673, prize adjudged on account of false documents. 14th November, 1673, ship not adjudged prize; although there were fictitious documents, the proof appearing favourable.

Finally, in his *Institute of the Law of Scotland*, published first in 1681, and afterwards in 1693, that able lawyer and judge, Lord Stair, gives an excellent treatise on prize law—not inferior to any which had then appeared on the continent, except the celebrated *ordonnance de la marine* of 1681, achieved by Louis XIV., under the direction of his great minister, Colbert; and adopting the principles recognized by Grotius, and very much the practice of England, as less severe in the confiscation of neutral vessels and goods, than that of France.

HOLLAND.

For the administration of Maritime international law by the united provinces of Holland, during the 17th century, we may refer to the works of Grotius in this department, already expounded at some length, as containing a favourable account of the Dutch general practice, as being less severe than the French and Spanish against neutrals. And so far as they do not confine themselves to private maritime law, we find from the principal commentators on Grotius, particularly Barbeyrac, and also from Tiassens *Zeepolitie der Vereend Nederlande*, published at the Hague in 1670, that the Maritime international rules laid down by Grotius, were generally observed by the republic of Holland during this century, when not modified by special treaties.

In 1630, the states general of the united provinces enacted an ordinance respecting commercial blockade, which declared, that all vessels should be confiscated, which should trade with the ports of Flanders, on the ground of these ports being actually and continually blockaded by the Dutch ships of war. But this was strictly in conformity with the principles of the law of nations; such an actual blockade being primarily directed against the enemy, and quite different from those general interdictions of commerce, which, however, were frequent, and were submitted to by neutrals in previous times. *Coll. Marit.* p. 158.

After the unsuccessful attempts we have noticed, on the part of Sweden, the states of Holland exerted themselves strenuously for the establishment of the exemption of neutral vessels from visitation and search by belligerents, if not as a rule of the law of nations, at least by treaty, either upon the general plea of neutral vessels protecting hostile goods, or by the intervention of an armed government ship of war, in the character of a convoy. And this seems to have been the chief pretension of the Dutch, and perhaps, if not their sole, their most important deviation from the previous general and common consuetudinary law of nations. But these pretensions, we have seen, were uniformly resisted by England, under every form of government; and they were equally so by France, during the century we are now surveying. The French ordonnances of 1543, 1584, and 1681, we have had occasion to observe, established for the practice of that kingdom, the rigid rule by which hostile vessels are held to subject to confiscation neutral goods, and hostile cargoes are held to subject to confiscation neutral vessels. In 1646, the states of Holland had obtained from France a temporary suspension of this rule; and the preamble of the treaty expressly re-

cites the inconveniences arising from the peculiar severity of that rule, as enforced in practice by France, to have been the sole cause of the relaxation. *Recueil des Traités*, vol. III. p. 487. In 1655, De Witt boldly put forward this relaxation, so explained, and so limited by the treaty in which it is granted, as containing the exception of "free ship, free goods," in the utmost extent. And it was urged with considerable pertinacity on the part of Holland, (but at that time without success), that such a rule should be continued between the two countries, as a concession which had been before granted. *Coll. Marit.* p. 121, 122.

SWEDEN-AND DENMARK.

With regard to the administration of Maritime international law during war, by the Maritime states of the North Sea and the Baltic, during the 17th century, we have already seen from Loccenius, the Swedish jurist, and from Pufendorff, what were the views and practice of those northern nations, about the middle and towards the close of that century. And we likewise formerly saw, that in 1653, Queen Christina of Sweden, made an attempt to protect vessels carrying warlike stores from capture by belligerents, by means of an armed convoy; but appears from Pufendorff's Swedish history, to have abandoned the project as hopeless.

In 1659, the king of Denmark and Norway issued a proclamation, recognizing the following points of Maritime international law; that the sea briefs, or certificates of the property of neutral vessels, should be authenticated in a regular manner; that no goods belonging to the enemy should be loaded in such vessels; that the certificates concerning the neutral character of the cargo, should be in an authentic form, and should bear that it belongs *bonâ fide* to neutral merchants, without

cover or collusion, to protect it on its voyage, and on its arrival to give it over, as belonging to enemies, or to be sold for them; that a specification of the goods should be inserted in the certificate; that certificates of a different tenor, should be of no more avail in the court of admiralty, than if they were false; that the carrying of contraband to and from Sweden, should be prohibited to neutrals, enumerating the different descriptions of contraband goods, and including provisions with one particular exception; that there should also be reckoned among contraband of war, goods destined for the manufactures of Sweden, and goods manufactured in Sweden, in whatever ships; but the ships and goods, if proved, as required, to belong to neutrals, to be free; that goods, if not manufactured in Sweden, should be allowed to be exported from Sweden by neutrals, in ships of their own, &c.

SECTION IV.

Of the Conventional Maritime law of nations during war, in the course of the 17th century.

HAVING thus traced the leading rules of the common consuetudinary Maritime law of nations, especially during war, in the course of the 17th century, not merely as recorded in the writings of the principal international jurists, such as Grotius, Loccenius, Pufendorff, and Cocceii, but also as contained in the statutes, or sovereign ordinances and judicial determinations of the principal Maritime states of Europe, exhibiting their practical administration of that law, and in reality constituting that law, at least against, or in a question with themselves, on the general principle of reciprocity, it

remains to trace, during the same century, the progress of the conventional Maritime law of nations, as modifying by special agreement, and for a time superseding the practical rules previously established by usage. And as it was in the 17th century, that conventional Maritime law first became of much importance, it may be proper shortly to revert to the discussion on that subject, near the commencement of these researches.

For there is something very vague and ambiguous in the meaning of the terms, "conventional law of nations," as used by different international jurists, or even as used by the same jurists, on different occasions. So far there is no ambiguity, and there can be no doubt, that the special treaties or conventions concluded between, or among independent states, upon the general principle, *Pacta sunt servanda*, may and do supersede and modify the common general consuetudinary law, and constitute the particular conventional law between or among these states, on the points fixed by the treaties, to the extent of their provisions, and while they continue in force: such a definition of the conventional law of nations is clear and distinct; and such is the sense in which we have used, and will continue to use, these terms. But such is not the only sense in which these terms have been employed by different jurists, especially in more recent times. And it therefore becomes necessary to ascertain exactly, whether there be any foundation for any other conventional law, different from what has just been defined.

Now, to rear treaties up on another kind of conventional law, more comprehensive and durable, or permanent than the treaties themselves, there must evidently be some departure from the literal interpretation, or sound construction of these treaties. But, besides such a deviation from the ordinary recognized rules of inter-

pretation being logically incorrect, it is plain nothing but confusion can arise from mixing up the special stipulations of parties, with general rules of justice and reciprocity, ascertained by observation, and adopted from the experience of their general expediency.

Against the danger of having such recourse to treaties, Dr. Zouch and Van Bynkershoek long ago warned international jurists. "*Recte observat Zouchaeus,*" says Bynkershoek, "*non satis constare, an, quod illi pacti sunt, sit habendum pro jure publico, an pro exceptione, quâ, a jure publico, diversi abeunt. In variis pactis, et antiquioribus, et recentioribus, id adeo saepe est incertum, ut ex solis pactis, non consultâ ratione, de Jure Gentium pronuntiare, periculosum sit.*" Lib. I. cap. XV. p. 110, 111. Apparently with the view of obviating the difficulty and danger here pointed out, the able American lawyer, Dr. Wheaton, who seems to adopt, and to push still farther, the views of Martens and Klüber, with regard to this conjectural, if not altogether imaginary conventional law, in his late learned *Histoire des Progres du Droit des Gens en Europe*, p. 65, while he quotes the above passage, yet lays down the different, and, we think, rather exceptionable doctrine. § 13, *Droit des Gens Maritime fondé sur les Traités.* "*La seconde question, dont nous devons nous occuper, sera de déterminer, jusqu' à quel point, le Droit des Gens sous ce rapport, fut changé par des conventions, ou autrement, pendant la meme periode. Il faut observer ici, que pour decider, si les stipulations dans un traité doivent être considerées comme application de la loi pre-existante des nations, ou seulement, comme formant, une exception speciale, en les relachant de la rigueur primitive, de la loi coutumier, entre les parties contractantes, on ne doit pas s' en rapporter, seulement à une interprétation literale du texte du traité même, mais*

on doit envisager toutes les circonstances extrinsèques, qu'on peut supposer avoir déterminé le consentement des parties."

Now, no doubt, if we are to go out of the terms of the treaties altogether, and to be guided in our conclusions by taking into view, and proceeding upon, all the extrinsic circumstances which may possibly, or even probably, or plausibly, be supposed to have influenced and determined the consent of states, we may easily ascribe to treaties almost any meaning or import, and to parties, almost any intention we please. We may suppose the contracting states deemed the stipulations so equitable and advantageous, that they intended they should be, not temporary, but perpetual; only omitting to say so. We may suppose that, although the parties only contracted with one or two other states, they had the same reasons or inducements for entering into the same arrangements with other states; and, therefore, tacitly, or virtually, consented to do so; considering any declaration to that effect unnecessary. Again, we may suppose the contracting parties were so pleased with the bargain they had made, that they were willing to pass from all other objections, which would have annulled the treaty, short of total failure to perform; and that they thereby rendered it next to indissoluble. But such loose conjectural reasoning would not be admitted, even in the investigation of ordinary historical facts. And still less is it admissible, for the purpose of rearing up onerous obligations against independent states, contrary to their will, and to their previous uniform declaration and practice.

After the observation before quoted, and some farther sensible quotations from Bynkershoek, Dr. Wheaton recites briefly a number of treaties, chiefly during the 17th century, which, between the contracting parties,

established some rules different from those previously in practice. And, like the preceding jurists, who have maintained the same doctrine, assumes, as if it were an axiom—a truth perceived by intuition—that the stipulations in these successive treaties became part of a general conventional law of Europe, binding not merely on the contracting parties, to the extent of the provisions, and for the continuance of the particular treaties, but to the full extent of the stipulations in perpetuity, and upon all modern civilized states, whether parties to those treaties or not. Such gratuitous assumptions, however, are utterly inadmissible.

In maintaining, to such a latitude, the authority of a general conventional law of Europe, chiefly, to all appearance, for the purpose of supporting their favourite doctrine, of “free ship, free goods,” there is manifestly a great fallacy in the reasoning, not only of some of the international jurists of the north of Germany, and of the Northern Kingdoms, but also of the more recent French jurists, and latterly, as we have just seen, of an American jurist. The error consists in ascribing to what they call the conventional law of nations, the validity and obligatory force, which only belong to the natural law of nations, or their legal or juridical relations as such, and to the positive common consuetudinary law of nations, chiefly as recognizing and giving effect to the natural law, but founded partly also on habits of reciprocal conduct, or treatment and usage, for ages.

Conventional international law is admitted, by the jurists alluded to, from the Abbé de Mably, to Martens, Klüber, and Wheaton, to be founded on treaties. But while they make this admission, they ascribe to it a mysterious power beyond the import or duration of these treaties. They, by fiction, construct out of these

treaties a law composed of certain stipulations and clauses, usually inserted in these treaties, but frequently from considerations of temporary convenience; and give to these clauses, which are liable to be extinguished, or to become ineffectual by the first rupture, if not ipso jure extinguished by the lapse of the terms fixed by the treaty, an imaginary perpetual duration, and an imaginary general extension, so as to make them binding, not only on the contracting parties, while the treaty is in force, but on all other nations, whether parties or not, and in all time coming. For this imaginary structure, the sole foundation is, that a nation in a few treaties with a few other nations at certain times, found it for its real or supposed interest, to make or agree to such stipulations, either for a definite time, fixed by the treaty, or indefinitely, but subject to the dissolution to which all pactions or treaties are liable, from their conditional nature, or from the subsequent inconsistent conduct of the contracting parties. But such an inferential law, it is plain, rests upon no solid basis; the conclusion does not follow from the premises. The fact of A having entered into certain treaties with B and C, does not imply any obligation to enter into the same or similar contracts with X and Z for the same, and still less for longer periods. A series or succession of identical or similar treaties, between two or more nations, proves the habit or custom of such nations to enter into such treaties. But such a habit or custom does not imply an obligation to enter into such treaties, or render the obligations contained in them binding, unless the agreements have been so entered into. On the contrary, the very renewal or repetition of such treaties, proves the conviction of the parties, that the obligations specially undertaken by these treaties, would not, unless so undertaken, be binding at common law. This ingenious

theory, therefore, although it may serve, and has been urged, and may perhaps have been devised, to serve the temporary interests of particular states in particular situations, has, in reality, no foundation in the natural law of nations, rude or civilized, or in other words, in the observed and ascertained legal or juridical relations of states. And it ought to be resisted, and its fallacy exposed, in order to prevent its coming to have weight with the less instructed in such matters, from its ostensible plausibility, and from the ingenuity and interested zeal with which it is maintained. After these expository remarks, we proceed with an historical notice of the conventional Maritime law of nations, during the 17th century, in the proper and only legitimate sense of these terms.

In the course of the centuries, from the 12th to the 15th, inclusive, and also during the 16th century, we have seen that the comparatively few treaties which then occurred, were entered into chiefly by the larger, though perhaps less civilized nations, either for the purpose of securing more effectually the observance of the rules which experience had previously recognized as just and equitable, or reciprocally convenient; or for increasing the severity of these rules, by confiscating a vessel for carrying a hostile cargo, or by confiscating a neutral cargo, as having been carried by a hostile vessel.

At the commencement of the 17th century, in 1604, King Henry IV. of France concluded a treaty with Sultan Achmet, by which, *inter alia*, it was agreed, that goods belonging to the enemies of the respective nations found on board the vessels of either nation, should not be confiscated as prize. What led to this reciprocal stipulation does not distinctly appear. And it is amusing to find some late French and other continental jurists complimenting the Turks, apparently at the expense

of England, as, though comparatively barbarous and uncivilized, having been the first nation, along with France, to introduce this milder form of warfare: forgetful, that notwithstanding this dereliction of legal right, in relation to the Turks in 1604, France continued down to the years 1744, and even 1778, in relation to states with which she had no treaty, not only to capture as prize, hostile goods found on board neutral vessels, but to confiscate the vessels also on that account.

Having at last found, in the Franco-Turkish treaty or grant of 1604, the wished for stipulation, the more recent theoretical jurists just alluded to, proceed to select and recite a series of treaties concluded in the course of the 17th century, particularly the second half thereof, containing similar stipulations; and upon this series found the establishment of what they call the new Maritime law of nations, namely, "free ship, free goods," dragging after it, for the semblance of consistency, the equally unfounded, and still more unjust rule, that a hostile vessel subjects the neutral goods on board to confiscation. But this is not just the correct way of endeavouring to discover or arrive at the truth. In order to draw a fair conclusion, with regard to the effect produced on Maritime international law, by the treaties of the 17th century, we ought not to select one series of treaties, agreeing in a few similar stipulations, and to throw out of view all the evidence of the actual administration and practice of that law, during that century, afforded, we have seen, not only by the writings of maritime jurists, but by the statutes, sovereign ordinances and proclamations, and judicial determinations of the different European states. On the contrary, we ought to take these treaties in chronological succession; to compare them with the equally valid evidence of actual practice just specified, and to investigate whether

there arose out of these treaties, any general or universal and uniform practice, different from the former practice, and held to be binding upon, or at least actually observed by nations, independently of such treaties, or except in virtue of these very special treaties, to the extent of the provisions thereof, and while they continued in force.

In 1612, Sultan Achmet granted similar privileges to the Dutch; but neither by this grant, nor by the treaty or grant of 1604, to King Henry IV. of France, do neutral goods on board hostile vessels appear to have been subjected to confiscation—the counter part of the pretended “new rule.” In the treaty of commerce of 1646, the United Provinces prevailed on the French government, so far to derogate from the *ordonnance de la marine* of 1543, which declared that hostile goods found on board neutral vessels, should involve the confiscation of both cargo and ship, by agreeing that Dutch vessels should be held free, “*bien qu’il y eut dedans, de la marchandize, même des grains et légumes, appartenans aux ennemis.*” But this merely liberated the Dutch neutral vessels which carried hostile goods from confiscation, not the hostile cargo, as pretended by De Witt.

The treaty of Westphalia in 1648, was a most important treaty for the continental nations, in point of territorial arrangement; but contains little or nothing regarding points of Maritime international law.

By the treaty of the Pyrenees of 1639, between France and Spain, it was stipulated, that if either of the contracting parties should engage in a war with a third party, while the other remained neutral, hostile goods on board neutral vessels should be free, while neutral goods on board hostile vessels should be liable to seizure and confiscation. The sole object of this article, Dr. Wheaton justly observes, was to introduce a new law between the

two contracting parties. And the wonder is, that so able a lawyer should ever hold any such conventional stipulation to have any other effect, than to introduce for the time a new, or at least a somewhat different, or modified law, between or among the contracting parties; or to suppose that such a reciprocal stipulation between France and Spain, could bind Great Britain, Sweden, or Denmark.

The assistance granted by King Charles I. of England to the house of Braganza, towards the establishment of the independence of Portugal, was continued by Cromwell, and led to that intimate alliance between England and Portugal, which lasted so long; and to that treaty of navigation and commerce between the two powers in 1654, by which so many important commercial privileges were stipulated and conceded. And among these special privileges, the Portuguese stipulated and obtained; that, of their vessels carrying the goods of the enemies of England during war, without being liable to seizure or confiscation. But how this can be said to have introduced a new law of nations into Europe, it is not easy to see.

Into the causes, the merits or demerits of the attachment of Charles II. of England to France, after his restoration, this is not the place to inquire. But certain it is, he was on a very amicable footing with Louis XIV. while the latter was still at open war with Holland; and the treaty of 1667 was concluded between these monarchs, by which, on the one hand, France obtained the admission into England of her finer manufactures, and England obtained the advantage of her merchant vessels carrying the goods of the enemies of France, without molestation or risk of seizure.

From the treaty of Westphalia in 1648, by which the independence of the United Provinces was recognized,

the great object of the Dutch republic, beside the maintenance of the balance of power in Europe, so necessary for the security of her national existence, was the protection and advancement of her navigation and commerce, colonies and fisheries. And for the attainment of this object, her obvious interest, like that of the Hanse towns in former ages, was to introduce a new rule or practice, under which her merchant vessels might carry not only her own goods, but also the goods of all other nations, whether at peace or war, without interruption. And being apparently aware that there was little prospect of being able to accomplish this object, upon the pretext of unlimited right, agreeably to the principles of the law of nations, even as expounded by her own admirable international jurist, Grotius, she had recourse to the only other remedy, to try what could be done by negotiation through her able statesmen, and by treaty. Such a proceeding was quite justifiable. The then recent, severe ordinances of France and Spain, subjecting neutral vessels to confiscation, if found carrying hostile goods, and neutral goods to confiscation, if found on board hostile vessels, contrary to the previous practice, may have suggested, and at all events rendered such measures on the part of Holland more necessary. And to the extent of the consent thus obtained by her, through negotiation, the Republic was entitled to bind the contracting parties, so far, and so long, as they had agreed to be bound. But the Republic was not entitled to go farther; and indeed, at that time, did not attempt to go farther. And while we admit the correctness of Dr. Wheaton's statement, as to the political motives, by which Holland was influenced in this matter, we cannot admit the importance which he attaches, and the high position and ostensible rank, which he here indirectly and plausibly assigns, to what he calls the principle, but

which is in reality, the legal fiction of "free ship, free goods;" and still less, that on this occasion, Great Britain conceded that principle, or recognized it as a fundamental rule of international law.

"Les interets de la Hollande," says Dr. Wheaton, "comme puissance belligerante, ou comme puissance neutre, l'engageait à désirer la ferme établissement du principe, de 'Libres vaisseaux Libres marchandises,' comme la loi générale, par laquelle elle gagnerait plus, tant que les autres puissances seroient en guerre, et que la Republique resterait neutre, qu'elle ne perdrait, quand cet état des choses serait changé. L'Angleterre," he continues, "concéda pour la première fois, ce principe, par le traité de commerce conclu à la Haye en 1668, comme prix d'une alliance entre les deux pays, contre la France." *Hist. du Prog. du Droit des Gens en Europe*, p. 72, 73.

But the *ex parte* convenient practical maxim of "free ship, free goods," which the Hanseatic traders first shrewdly suggested from selfish considerations, but which Sartorius informs us, they applied only to others, never to themselves, does not deserve the appellation of "un principe," if by that term be meant a primary and fundamental principle of natural justice—of the natural or common law of nations. That it was not at the time referred to, a rule of the common consuetudinary law of nations, we have already seen from the records of the 16th and preceding centuries, and also of the 17th century. And that it is not a principle of the natural common law of nations, we shall afterwards have an opportunity of showing, for various reasons.

Nor is it correct to say, that on the occasion before mentioned, Great Britain conceded, or surrendered indefinitely, or in relation to all and sundry, the right which every independent state has, by the law of na-

tions, when engaging in war in self defence, or in prosecution of its legal interests, to seize the property of its enemy found exposed in the open seas, without the territory of any other people. It is true, that by article VIII. of the marine treaty of 1674, Chalmer's Coll. vol. I. p. 182, England, by special compact, and in consideration of reciprocal advantages, agreed for a time to give up this right in favour of Dutch merchant vessels. But that this was a concession or surrender of right—a privilege which could only be obtained by either party, by means of special compact, is manifest from the terms of the treaty itself. And these terms afford no more ground for inferring that this concession was understood by the contracting parties to be in perpetuity, or indefinite, in relation to other nations, than is afforded by the terms usually, almost uniformly, employed in framing treaties of peace.

From the family connection, indeed, which soon afterwards took place between the rulers of England and Holland, and from the close union between the two nations, which the aggressive policy of Louis XIV. forced them to maintain, for the preservation of their independence and of the liberties of Europe, there were for a considerable period no open rupture between the two countries, and no dissolution of these treaties, by express mutual consent, or by infractions of magnitude on either side. But, in point of fact, it appears from the reciprocal complaints on both sides, that this stipulation of the marine treaty was not strictly observed by either nation. And this may partly perhaps have arisen from this stipulation, besides the other objections, to which we shall afterwards see it is liable, being from its nature unfit to become the subject of a bilateral contract. Its justice and equality, even between the contracting parties, are obviously dependent on a contingency, the conduct of a

third party, not bound by the contract;—the other power with whom one of the contracting parties may subsequently go to war. For, unless that other belligerent power adopts the same line of conduct, the observance of the stipulation by the one contracting party would evidently give the opposed belligerent a great advantage over him, to which the general and vague terms of the stipulation may not, in that event, legally bind him to submit. Such was the argument of the Spanish government in 1780; and it appears to be well founded.

While the justice of the English navigation act, introduced by Oliver Cromwell in 1651, and confirmed by Charles II. could not be disputed, it, of course, tended to deprive the Dutch of a portion of the carrying trade, of the north of Europe, which, after the decline of the Hanseatic confederacy, they had contrived in a great measure to monopolize. And to protect the commerce of his country against the blow given to it by this measure, their able statesman, De Witt, endeavoured to prevail on the French government to relax the severity of their prize code, and to adopt their favourite maxim of "free ship, free goods." In 1646, the states general had obtained a temporary suspension of that severe rule of the French ordonnances of 1543 and 1584, by which neutral vessels loaded with the goods of the enemy were subjected to confiscation, as well as the cargo. But this was all the treaty of 1646 granted; and it is not true, as has been pretended, that the French government then recognized "free ship, free goods," as a principle. On the contrary, that concession could not even be obtained in the year 1658; for the Dutch minister at Paris wrote De Witt, that he had obtained in 1658, "*le rappel de la pretendue loi Française, que la robe d'ennemi, confisque celle d'ami; de maniere que si, dans la suite, on trouve dans un vaisseau libre Hollandais, des effets ap-*

partenans à un ennemi de la France, ces effets seuls seront relachés; parce qu'il est impossible d'obtenir le 24^{me} article de mes instructions, ou il est dit, qu'un vaisseau libre doit rendre la cargaison libre, meme si elle appartient à un ennemi. Coll. Marit. p. 121, Wheaton 72, 3.

By persevering in their exertions for the protection and advancement of their carrying trade, the Dutch, during the vicissitudes of peace and war, which took place in the latter part of the 17th century, appear to have succeeded in getting stipulations inserted in their treaties with France, which accompanied the peace of Nimeguen in 1678, and the peace of Ryswick in 1697, for permission to their vessels to carry the goods of the enemies of France, without seizure or stoppage. But it is quite unwarranted, if not absurd to say, that these special stipulations established definitely the rules of "free ship, free goods," and of "hostile ships, hostile goods," on the part of France generally, or even between the two countries. For they were merely special pactions, or temporary conventions, which, if not expressly limited in duration, were liable to interruption or extinction, by subsequent breaches of these treaties in other respects, or by subsequent hostilities, if not expressly confirmed or renewed. And so far was France from recognizing such a rule as "free ship, free goods," in general, that in the interval between these two treaties, Louis XIV. enacted his celebrated ordonnance of 1681, by which not only the goods of the enemy found on board neutral vessels were confiscated, but also the vessels themselves, and which, Valin informs us, continued to be the law and practice of France down to the reglement of 1744, which released the neutral vessel and neutral part of the cargo; but adds, *mais comme ce nouvel arrangement n'a été pris, que relative-*

ment aux traités, conclus avec quelques puissances, amies ou neutres, et que cela peut changer dans la suite, il ne faut pas perdre de vue, le principe établi par cet article, suivant lequel, des qu'il a des effets ennemis, dans un navire, tout est sujet a confiscation. Valin, *Traité des Prises*. Chap. V. Sect. V. § 4.

By a treaty of navigation and commerce between France and the Hanse towns in 1655, it was agreed, contrary to the practice of France and Spain, and contrary to the second rule or branch of the new system introduced by the neutral advocates, that the hostility of the vessel should not confiscate the cargo, and that goods belonging to the citizens of the Hanse towns, although found on board the vessels of the enemy, should be free. On the other hand, it was agreed by this treaty, that the goods of the enemy found on board Hanseatic vessels, should be free, with the exception of the cases of contraband of war, of the destruction of ship's papers, and of resistance to visitation and search. But even with these exceptions, the license here given to the carriage of hostile goods, like the similar friendly concession of Elizabeth of England to Henry IV. of France, appears to have been attended with abuses; for the concession was revoked by the treaty of 1716, which permitted as formerly, the seizure of the goods of the enemy, on board neutral vessels at sea, exempting the vessels only from confiscation.

By the treaty of commerce between France and Denmark of 1663, Art 27, and by the treaty of alliance between France and Sweden of 1672, Art 19, it was agreed that neutral vessels should protect hostile goods, and that the hostility of the vessel should confiscate the cargo. Why the latter rule, unjust in itself, and inconsistent with the common consuetudinary law of nations, was agreed upon, does not appear, unless it was to deter

neutrals from employing the ships of the enemy. The object of the former rule seems to have been, to secure to Denmark and Sweden a safe export, and to France a safe import, of those naval stores and other commodities, of which the latter stood much in need. But neither France on the one hand, nor Denmark and Sweden on the other, recognized these rules as international law, during the 17th century. With regard to France, we have just referred to the evidence of this statement. With regard to Denmark, it appears from the Danish ordinance of 1659, that to protect goods from seizure, as belonging to the enemy, there behoved to be a special certificate upon oath, of the neutral property of the cargo, so as to negative a collusive interest in transitu; that ships and goods thus ascertained to belong to neutrals, should not be subject to confiscation, except goods contraband of war, to or from the country of the enemy; and that a neutral trade, permitted in certain specified articles, was required to be in the ships of the merchant's own country. And with regard to Sweden, it appears from the Swedish ordinance of 1715, that all goods belonging to subjects of the enemy, or shipped on their account, were held liable to confiscation, in whatever vessels they might be found.

In the treaty between Denmark and Sweden of 1670, the common consuetudinary rule appears to have been adhered to. And in the treaties between England and Sweden of 1661, and between England and Denmark of 1670, the rules of the common consuetudinary law were likewise recognized, subjecting the property of the enemy to confiscation, though on board neutral vessels, but not those neutral vessels themselves, and protecting neutral goods, though on board hostile vessels, if proved to be really neutral, in the manner prescribed by the treaties.

The different treaties before noticed, it will be observed, relate chiefly to hostile goods on board neutral vessels. With regard, again, to neutral goods on board hostile vessels, we find in the 17th, as well as in the preceding centuries, treaties confirmatory of the rule of the natural and common consuetudinary law of nations, and providing for the restitution of such goods to the owners, if found to be really neutral. On the other hand, we find different treaties during the 17th century agreeing, that goods, though really neutral property, shall be held liable to confiscation, in consequence of their being found in the vessels of the enemy. Reference may be made to the marine treaty between Philip IV. of Spain and the United Provinces in 1650, the treaty of Westminster between Cromwell and the Portuguese in 1654, the treaty between Portugal and the United Provinces in 1661, and the treaty between England and the United Provinces in 1668 and 1674. But this last rule is so contrary to the feelings of natural justice, to international legal principle, and to the pre-existing common consuetudinary law and practice, that it seems to have been suggested and introduced by neutrals, to prevent the private merchant ships of either belligerent from getting any neutral goods to carry; and to serve as a counterpart, set off, and excuse for their favourite maxim and pretended right, to protect the goods, and carry on the trade of one, at least, if not of both the opposed belligerents.

Such are the chief, and the most, if not all of the treaties in the course of the 17th century, which contain stipulations, relative to goods of the enemy on board of neutral vessels, and neutral goods on board of hostile vessels. And so far as they have not expired by the lapse of their specified duration, or by the intervention of hostilities, without renewal, or by the lapse of time

indefinitely, or been annulled by the failure of one of the parties to fulfil the counter-stipulations, or been revoked by the express consent of both parties, or virtually by both parties passing from the stipulations, or by the subsequent adoption of other arrangements, these treaties formed, and form the particular conventional law between or among the contracting nations, to the extent of their provisions, so as to supersede to that extent, the rules previously adopted as just, or equitable, or convenient, and sanctioned by usage for ages. But that those few treaties concluded chiefly during the latter half of the 17th century, created a body of international law, binding upon all nations, with regard to the particular stipulation of neutral vessels protecting hostile goods from seizure, appears to be a fiction, as fanciful and imaginary as the "social compact" of Rousseau. Does the circumstance of a nation, having at one period entered into a convention, containing a particular stipulation, without defining the time of its duration, afford any solid ground in law or common sense, for holding that that nation must remain bound indefinitely, not only to the other contracting people, but also in relation to all other nations? Does the circumstance of a number of nations having made special bargains, separately with each other, though all adopting one particular stipulation, raise a rule so stipulated, into a principle of international law, in opposition to previous general, if not universal usage, so as to be binding not only on the opposite contracting parties, although the treaties may have expired, or been annulled by infringement, but also in relation to other nations, though not parties, and on all other civilized nations, in relation to all other such nations, whether they ever were parties to such treaties or not?

Such a theory, when thus thoroughly investigated,

seems to be quite extravagant and untenable. And while all the great international jurists of the 17th century, all the statutes, sovereign ordinances, and proclamations, and judicial determinations of the different European states in the course of that century, prove the recognition and observance in the actual administration of the law, of the common consuetudinary rule, that the property of the enemy may be lawfully seized as prize, on the open sea, although in its passage on board neutral vessels, the treaties before referred to cannot be correctly viewed in any other light, than as exceptions from the general rule; valid as long as the conventions creating these exceptions have not expired or been departed from, by subsequent arrangements, or been annulled by subsequent infringement.

The only jurist of the 17th century who maintained the claim of neutrals to protect hostile property from seizure, appears, as we formerly saw, to have been the obscure, and perhaps too much under-rated Groningius. This claim he urged as advocate for Louis XIV. against Great Britain and Holland, and for the neutral governments of Denmark and Sweden. And to a certain extent, he was in the right. For on this occasion, Great Britain was so far misled by Holland, as to commit one of the few departures from the common law of nations, with which she can be justly charged, by concurring with the States General, in a sweeping declaration of blockade against the ports of France, or a general interdiction of commerce with France by sea. Such an interdiction, although not without precedent in former ages, was, and is, illegal, because, like the theory of the neutral flag protecting hostile property, it was, and is, founded on a fiction; namely, the assumption, that all the ports of the hostile country were actually blockaded, when they were not. So far Groningius was in the

right; and likewise in so far as the objection to the neutral claim, was founded on the plea of any empire of the sea, possessed by either Britain or the United Provinces. Indeed, to the extent of the illegality of the interdiction of commerce, beyond the actual blockade, Great Britain appears to have admitted her error to the Danish and Swedish governments. But beyond this Groningius was in the wrong; and upon the grounds stated by the other more eminent jurists before noticed, the neutral claims of Denmark and Sweden were resisted by the British and Dutch governments, then struggling for the maintenance of their independence and liberties, against the aggression of Louis XIV. Yet even Groningius in his argument, did not found on any imaginary general conventional law of nations, as resting on treaties, but extending beyond the sphere and duration of these treaties. He founded merely on what he maintained, though erroneously, to be the principles of the natural law of nations; and on certain treaties between the United Provinces, and Denmark, and Sweden, as binding on the contracting parties, and thus constituting the particular or conventional law of nations.

CHAPTER VII.

OF MARITIME INTERNATIONAL LAW, CHIEFLY DURING WAR,
IN THE COURSE OF THE FIRST HALF OF THE EIGHTEENTH
CENTURY, FROM 1700 TO 1756.

WE have now brought our researches in Maritime international law, chiefly during war, down to the 18th century. And as in proportion to the continued extension of maritime intercourse and commerce among the European nations, new collisions of interests, and points for discussion occurred, and certain doctrines, though by no means altogether new, as frequently supposed, were more vehemently urged than formerly, it may be proper to divide the 18th century, and what has elapsed of the present century, into the following parts. First, from the commencement of the 18th century, embracing the peace of Utrecht, to about the middle of that century, or to the war which commenced in 1756, and terminating in the peace of Paris in 1763. Second, from the war which commenced in 1756, and terminated in 1763, to the war which commenced in 1776. Third, from the war which commenced in 1776, to the war which commenced in 1793. Fourth, from the war which commenced in 1793, to the peace of Amiens in 1801. Fifth, from

the peace of Amiens to the congress of Vienna, and general peace in 1814 and 1815. Sixth, from the general peace in 1815 to the present time.

In entering upon the 18th century, we shall, as formerly, consider, in the first place, the principles or leading rules of the general common consuetudinary law, recognized and observed among the European nations, as expounded by the international jurists, who lived in the earlier part of that century: In the second place, the practical administration of that law, by the principal maritime states, as recorded in their legislative enactments, sovereign ordinances and edicts, and judicial determinations, which law, on the principle of reciprocity, is valid, at least, against, or in a question with themselves: In the third place, the particular and temporary conventional law of nations, as recorded in the treaties between two or more of these states.

SECTION I.

Of the writers on Maritime international law, chiefly during war, in the course of the first half of the 18th century, from 1700 to 1756.

WE concluded our notice of the international jurists of the 17th century, by mentioning Leibnitz and Henry Baron de Cocceii; the works of the former, in the Science of Law, having been composed and published during the earlier part of his life. Of the international jurists, who appeared during the first half of the 18th century, the principal seem to have been, the Prussian chancellor Samuel Baron de Cocceii, the German Civil or Roman law professor Heineccius, the Dutch president Van Bynkershoek, the Genoese or Tuscan lawyer Casaregis, the

German Baron Wolff, the Saxon and Polish privy counsellor Vattel, and the German professor Surland.

SAMUEL DE COCCEII.

Of these international jurists, Samuel de Cocceii was so much occupied with his endeavours to correct what he conceived to be erroneous in Grotius, in regard to the fundamental principles on which the law of nations rests, and in maintaining the doctrine revived in the present times, that law is strictly and properly the command of a superior power; and also with his attempt to show the identity of the Roman law with the law of nature; besides the laborious composition of the Code Frederic, as apparently not to have found leisure to devote to the cultivation of Maritime international law. Accordingly, on the subject of the rights and duties of neutrals during war, he does little more than repeat the doctrines of Grotius, and of his father, Henr. de Cocceii.

We shall, therefore, merely extract a few short paragraphs, in which this able and acute Prussian lawyer concisely states the leading doctrines of the Maritime law of nations, as recognized and observed in his age. These passages are taken from the 12th of the proæmial dissertations, introductory to his father's learned Commentary on Grotius.

RECIPROCAL RIGHTS OF BELLIGERENTS.

Lib. VII. cap. II. § 743. *Res hostiles capere jure naturae possumus, easque dominii jure, nobis adquirimus in infinitum; et ultra modum debiti ac poenae. Idque consensu Gentium probat Grotius. Ratio naturalis hæc est, quia reparatio aliter mihi fieri non potest, nisi media, quae neganti reparationem inserviunt, ei auferam. * * * Capere autem, in infinitum, licere, quia impossibile est, ut justa proportio inter damnum*

datum, impensas, et id quod interest, ac inter capionem rerum hostilium, observari possit.

Capi res hostilis potest, non tantum in territorio hostili, sed etiam in territorio sociorum; et, si res in nostro inveniatur. Non, vero, capi potest res, in territorio medii, seu pacati: ibi enim inspicitur status, quo res fuit, ubi pervenit ad territorium pacatum.

Capere res hostis possunt omnes, qui bellum gerunt, vel si assistant, auctoritate eorum. Capi possunt res hostiles, mobiles sive immobiles, non res mediorum, quae in terrâ, aut navi hostili, inveniuntur; res, autem mediorum, dici non possunt, res quae olim eorum fuerunt, et justo bello esse desierunt. Si medius aliquis asserit, rem non hostilem, sed suam esse, id probare tenetur.

Ut res hostilis adquiratur capienti, requiritur, ut vere capta sit; capta autem jure naturae videtur, quando in nostrâ potestate est, adeoque in rebus mobilibus, si intra praesidia maritima, vel terrestria, deducta est.

RIGHTS AND OBLIGATIONS OF NEUTRALS.

Lib. VII. cap. V. § 786, § 787, § 788. Praemittandum est, in cujusque populi arbitrio, naturaliter esse, medium se gerere, inter utramque partem.

Officium mediorum erga bellum gerentes in quatuor, praecipue, regulis, consistit. Quod uni, prae altero, favere non debeant. Quod pacatus utrique, bellum gerentium, plenissimam securitatem, in suo territorio, praestare debeat. Quod pacati sequantur praesentem possessionem. Quod personae et res eorum, qui bellum gerunt, si intra fines pacatos inveniuntur, eam retineant conditionem, quam habent in momento, quo intra fines, veniunt.

Officium bellum gerentium erga medios, in eo consistit, quod nihil in eos, occasione vel praetextu belli statui

possit, quo jus eorum laedatur vel turbetur. Neuter prohibere vel turbare potest commercia pacati cum altero hostium, idque verum est, etsi hostium vires inde augeantur uti si ferrum, arma, frumenta, aliaque quae in bello usum habent, afferantur. At impedire pacatum possumus, si, ex. gr. in urbem absessam, frumenta, arma, &c. inferre velit; idque jure necessariae defensionis; nec commercium impeditur.

§ 790. Regula, ergo, firma manet, medios laedi a bellum gerentibus, non posse. Except. Si medii esse desinunt; Si plus favent uni parti, quam alteri; dene-gando uni, quod alteri permiserunt; mittendo auxilia alteri, bellum gerentium.

In the preceding paragraphs, relative to the officium Bellum Gerentium, the author does not refer to any other authorities than passages in Grotius, and in his father's *Dissertatio de Jure Belli in Amicos*, both before quoted at sufficient length. And it is plain, the Chancellor adopts his father's view, that contraband in war does not depend so much on the quality of the articles, namely, their natural or artificial aptitude for immediate use in war, as their destination, or intentional supply, as affording aid in military operations; and that any restrictions upon neutral trade are founded not so much upon the nature of the articles, as upon the furnishing of them having a direct tendency to counteract a military operation by the enemy, such as a blockade, or as being a partial act, by which the neutral ceased to be neutral, or substantially sent aid to the opposite belligerent. Now, to a certain extent, this view appears to be well founded. But as we shall afterwards see, in noticing the works of Lampredi and of Tetens, neither the elder Baron de Cocceii, nor the Prussian Chancellor, his son, appear to have attended to that rule of reason and of law, by which, when two rights both well founded,

come into collision, the right, of which the breach admits of adequate reparation and compensation, must yield to the right, of which the breach does not, in the nature of things, admit of any such reparation or compensation. And Chancellor de Cocceii, in his preceding enunciations, *medios laedi, a bellum gerentibus, non posse;—neuter prohibere vel turbare potest, commercia pacati, cum altero hostium*, (which, to a certain extent, is quite true), has also omitted to mark the distinction which exists in fact, between the commerce of the neutral state, properly so called, with the other belligerent, and the commerce of that belligerent with that state.

HEINECCIUS.

Heineccius was chiefly distinguished by his methodical abridgements of the Roman law, and his researches into the antiquities of that Code. But, beside his edition of the works of Stypmannus, Kuricke, and Loccenius, under the title of *Scriptorum de Jure Nautico fasciculus*, he himself composed a work on Maritime international law, under the title of *Exercitatio de Navibus, ob vecturam Mercium vetitarum, Commissis*. This work of Heineccius, and that of Bynkershoek, entitled, *Quaestiones Juris Publici*, appeared much about the same time, between 1730 and 1740. But as Bynkershoek mentions at the end of the 14th chapter of his work, just alluded to, that after he had composed that work, but before its publication, he had seen the dissertation of Heineccius, the latter must, of course, be held of earlier date; and we shall therefore begin with it. As already noticed, Heineccius distinguished himself chiefly as a very learned and methodical teacher of the Civil or Roman law. But the international treatise before mentioned, is valuable, as it is of a practical nature, and

exhibits fairly the views entertained, and the customs in observance at the time he wrote, with regard to many of the most interesting questions in the Maritime law of nations.

In the first chapter of his dissertation, Heineccius treats of prohibited or contraband goods generally, whether by the revenue and commercial laws of each particular country, or *cum exteris*, with foreigners, by the law of nations, as contraband of war. And among the latter, after noticing what have been held such, in various previous treaties, he reckons not only cannons, gunpowder, arms, or other instruments of war, but also grain, salt, wine, oil, ropes, sails, and other naval stores, adding, *Quamvis enim alter populus forsan suo jure utatur, dum talia hosti alterius, subministrat; nec minus tamen, jure suo utitur, qui se adversus illos defendit, qui hostem reddere potentiores, non dubitant.*

In the second chapter, besides diverging into various other international doctrines, the author proceeds to consider the legal effects of vessels carrying goods contraband of war; and states, that on this ground vessels were captured, and held as good prize, unless the goods had been put on board by others, without the knowledge of the owners, charterer, or master of the vessel, or by the master, without the knowledge of the owners, so far as not bound by his act. He then remarks, that treaties have been often concluded between nations, by which it was agreed, that in such a case, the vessel should not be confiscated along with the contraband goods. And independently of such treaties, he lays down the following doctrine, as recognized common international law.

Those goods only which are carried contrary to law, are confiscated along with the vessel, not the legal goods, provided they can be separated from the illicit.

If both the vessel and cargo belong to the enemy, there can be no doubt both may be legally captured. *Si et navis, et merces, hostium sunt, nullum est dubium, quin utraque impare capi possunt; hosti, enim, in hostem extra civitatem, omnia licere, rationi consentaneum est.* When hostile vessels and cargoes are rescued from the captors, by the valour of the sailors, or escape by flight from the captors, or are ransomed from the captors, they, *Jure Postliminii*, return to their former legal state and condition. But if hostile vessels, loaded with hostile goods, be forced, in order to avoid a storm, to run into the port of a nation friendly to both parties, the *Jus Postliminii* does not take place to the effect of the prize being rescued from the captor by a common friend, and restored to the other from whom it was originally captured. For, those who are neutral, and cultivate friendship with both parties, must take the fact for law; and therefore, cannot arrogate to themselves the power of judging, whether the capture from either friend, has been justly or unjustly made. *Et sane, quum qui medii sunt animo, et cum utrâque parte colunt amicitiam, factum pro jure accipiant, adeoque, an ab alterutro amico, jure, vel injuriâ, praeda ista facta sit, judicium sibi arrogare, non possint.*

If the goods of friends are found on board hostile vessels, there is no good reason why these goods should be held to be acquired by the captor, along with the vessel itself. This can neither be on account of the condition of the owners of the goods, who are not supposed enemies, nor on account of any delinquency, for what fault is there in loading some goods on board a vessel belonging to another, who is the enemy of another; nor on account of the condition of the goods, for the supposition is, that they are legal, and not prohibited. "Unde merito," says Heineccius, "paullo inhumanior,

judicatur illarum Gentium consuetudo, quâ, navi hostili captâ, res hostium, et amicorum, juxta, in praedam cedere, capientibus judicantur."

If hostile goods are found in the vessels of friends, nobody doubts, they may be captured; because all things are lawful to the enemy against the goods of the enemy, to the extent of seizing and appropriating them, wherever found. But the same legal reasons do not admit of the vessels of friends being captured, on that account. For even the name of friend ought to protect them from such injury; especially seeing they only exercise their own right, when in the course of trade, they bonâ fide take on board their vessels the goods of another nation in friendship with them. As those merely exercise their own right, who carry off the goods of enemies from neutral vessels, so also neutrals do not act unjustly, who bonâ fide load their vessels with the goods of friends. Si res hostiles in navibus amicorum reperiantur, illas capi posse, nemo dubitat; quia hosti in res hostiles, omnia licent, câtenus, ut eas, ubicunque repertas, sibi possit vindicare. Sed has res amicorum, ideo capi posse, juris rationes non ferunt. Vel amici, enim, nomen, eos ab hac, injuriâ tueri debebat; maxime quum jure suo, usi sint, dum alterius gentis, sibi amicae, res in naves suas, negotiandi causâ, bonâ fide receperunt, Quemadmodum, ergo, jure suo, utuntur, qui res hostium ex istis navibus auferunt, ita et injuste, non faciunt, qui amicorum res navibus suis vehunt.

Here various questions of fact arise; as first, whether the prohibited goods be destined for the enemy? This may be easily ascertained, if there be found on board passports, and true or genuine certificates, charter-parties, bills of lading, and other such ordinary ship's papers. But these documents are frequently false and fabricated, or have never existed, or have been thrown

into the sea, or otherwise destroyed. Recourse must therefore be had to presumptions; such as if the vessel is found close to the shores of the enemy, unless forced thither by stress of weather; if inconsistent or contradictory documents are found on board; if there be proof that the master has thrown these documents into the sea. Another question is, whether the goods be truly the property of the enemy, or of friends. And here also recourse must be had to presumptions; such as the goods having been put on board a hostile vessel, until the neutral property be proved; the marks put by merchants and manufacturers on the chests, boxes, bales, or envelopes of goods; and the signs or ordinary indications of the goods having been sold and delivered, or placed at the risk of the enemy.

Another question regards the nationality of the vessel; and this is to be gathered from the flag, ensign, or standard; which, if hostile, is held sufficient to confiscate, unless it be proved that the flag was assumed from a just cause, such as the dread of pirates, or if the inferior mariners only were engaged in the fraud or deception.

The laws of each particular country fix, in what proportions Maritime prizes accrue to the national ships of war, and to privateers, cruising under the authority of government.

Heineccius next expounds the doctrine, as by that time, (about 1735), recognized by the laws and practice of the Maritime states of Europe, that captured vessels are held to be confiscated or condemned, only from the date of the sentence pronounced by the courts for the decision of Maritime prize causes. His argument in support of this practical rule is, that to complete the transference of the property, it must be declared; and is founded chiefly on the case of neutrals, to whom

great injustice would often be done, if the property were held to pass immediately upon the capture. And there can be no doubt of the salutary nature of that rule. After the sentence of condemnation has been pronounced, the prize becomes immediately the property of the purchaser, at the judicial sale by public auction.

After some observations on insurance, which belong to private, or internal, not to international Maritime law, Heineccius concludes with remarking, that, "if vessels, or their cargoes, be unjustly captured, and condemned as prize, the remedy is to send ambassadors, or other diplomatic ministers, to demand restitution or reparation, or to have recourse to reprisals." How far the latter mode of redress is agreeable to the international law recognized in modern Europe, we may have occasion to enquire, when we come to consider the dispute, which took place during the period we are now surveying, between Great Britain and Prussia, relative to the Silesian loan.

BYNKERSHOEK.

So much for Heineccius. Although not perhaps so profound in Roman legal lore, Bynkershoek was superior in several other respects. He had a more independent mind, and more extended views. He had less of the academic leisure of the professor; but his intellect was sharpened by practice at the bar, and by his long judicial occupation, as president of the supreme court of Holland. He was a statesman, as well as a scholar. And his views of Maritime international law are, therefore, the more valuable.

Bynkershoek was born at Middelburg, in Zealand, and was educated at the University of Freneker, in Friesland, where he received from Professor Huber, the character of "*juvenis eruditissimus*." In 1703, he was

appointed one of the judges of the supreme court of appeal, of the provinces of Holland, Zealand, and West Friesland; and in 1724, he was raised to the presidency of that court. Beside his works on the Roman law, and on the jurisprudence of his own country, he published also excellent treatises on international law, *De Dominio Maris*, *De Foro Legatorum*, and *Quaestiones Juris Publici*.

In his treatise *De Dominio Maris*, published in 1702, Bynkershoek admitted, that a nation may appropriate to itself certain parts of the sea; such as, first, the parts of the sea nearest the land, *mare terrae proximum*, within the reach of a cannon shot; *alioquin generaliter dicendum est; potestatem terrae finiri, ubi finitur armorum vis; etenim haec, ut diximus, possessionem tuetur*. Secondly, the seas which are either entirely surrounded by the adjacent territories of one single state, or have a passage into the great sea or ocean, of which passage, the coasts or banks are exclusively occupied by that state. But he denied the validity of the claims of the kings of England, to the seas adjacent to the British isles, indefinitely, and of Venice to the Adriatic Gulf. Indeed, the Disputes *de Dominio Maris*, which excited so much interest and discussion in the earlier part of the 17th century, had almost entirely ceased in the latter part of that century, as we formerly saw from the work of Loccenius, the Swedish jurist. And that matter had been allowed to rest on the footing on which Bynkershoek now placed it. It is therefore to be regretted, that not only other English writers, comparatively ignorant, and of inferior talent, but even the able and most learned Selden, should have sanctioned, by his name, such extravagant pretensions, thereby affording to subsequent continental writers, envious of her maritime greatness, a pretext for accusing Britain

of usurpation and tyranny; especially when it appears from the documents published in the *Life*, by Mr. Wynne, of Sir Leoline Jenkins, judge of the high court of admiralty, during the reigns of Charles II. and James II. that scarcely any thing was then claimed by England, beyond what Bynkershoek admitted, as before stated.

The principal work of Bynkershoek regarding the Maritime law of nations, is his *Quaestiones Juris Publici*, published in 1737. In that valuable work, after giving a distinct definition of war, he discusses various important questions and points of Maritime international law, and states the rules then observed in practice, of which the following is the substance.

A previous formal declaration does not appear to be necessary to render a war lawful. From the very nature of war, commerce between enemies ceases, whether expressly prohibited or not.

With regard to the persons of the enemy, to the right of putting to death, or subjecting to slavery, succeeded in christendom, the milder right of detaining, exchanging, or ransoming prisoners. Vessels and goods belonging to the enemy, when taken on the high seas, become the absolute property of the captor, without reference to the lapse of time, by actual and full occupancy, such as the captor is able to defend and maintain, namely, when the vessel and cargo shall have been brought into a port of his own country, or among a fleet of men of war, belonging to his government. By such absolute transfer of the property, the right of the original owner is extinguished. And the recaptor has the full right, and is not bound to make restitution to the original owner. If the property has not been so transferred to the captor, the original owner is entitled to restitution, upon payment of salvage, corresponding to the danger and expense incurred, and the labour and exertion bestowed.

Claims of debt, and rights of action, or judicial prosecution, competent to the enemy, are *stricto jure*, liable to forfeiture or confiscation, upon the breaking out of a war, as well as the effects of the enemy. But under the milder administration of the law, such personal claims are merely held to slumber, or to be suspended during the war; and if not expressly declared forfeited, or exacted by the belligerent government from its subjects, who are debtors to the enemy, are held to revive upon the return of peace, and to be restored to the true and actual creditors; especially among European nations, carrying on great commercial traffic with each other. *Neque, enim, commercia, sine contractibus, neque contractus, sine actionibus, neque actiones sine judiciis, neque judicia sine personis, quae jure litigant, explicari possunt.* Lib. I. cap. VII.

It is not lawful to attack an enemy within the territory, or in the sea-port of a friendly or neutral state. It is more doubtful whether, if two hostile fleets have commenced an engagement in the open sea, and the one fleet yields and gives way, the victorious fleet may not lawfully continue the engagement, and pursue the vanquished fleet, although the latter should be driven upon the territory of a friendly or neutral state. And this rather seems to be the rule, provided certain precautions be adopted; such as respecting the forts of the neutral power, though aiding the enemy, and of sparing the enemy, if they have actually entered the ports or harbours of that power. The territory of a common friend, has the legal effect of preventing the commencement of violence there; but it does not seem to have the effect of preventing the violence which has been commenced without that territory, from being continued in it, during the heat of the action.

The enemies of our friends may be viewed in two

different characters. If they be considered as friends, it is just and lawful for us to give them advice and aid, and even to assist them with military force. But so far as the belligerents are the enemies of our friends, it is not lawful for us to do so; because we would thereby prefer the one to the other, which the equality or impartiality of friendship or neutrality forbids. And, truly, this is not only what reason teaches, but also the recognized practice among almost all nations. *Si medius sim, alteri non possum prodesse, ut alteri noceam. Sed, aies, utrique mittam, quicquid mihi videbitur; et sic postulat ratio amicitiae. Si, quod alteri miseram, ille utatur, in necem alterius, quid ad me? At tu noli sic sapere; quin potius crede, amicorum nostrorum hostes, bifariam considerandos esse; vel ut amicos nostros, vel ut amicorum nostrorum hostes. Si ut amicos consideres, recte nobis iis adesse liceret ope, consilio, easque juvare milite auxiliari, armis, et quibuscunque aliis, quibus in bello opus habent. Quatenus, autem, amicorum nostrorum hostes sunt, id nobis facere non licet, quia sic alterum, alteri, in bello praeferremus, quod vetat aequalitas amicitiae, cui imprimis studendum est. Praestat, cum utroque amicitiam conservare, quam alteri in bello favere, et sic alterius amicitiae tacite renunciare. Et, sane id, quod modo dicebam, non tantum ratio docet, sed et usus, inter omnes fere Gentes, receptus. Quamvis, enim, libera sint cum amicorum nostrorum hostibus commercia, usu, tamen, placuit, ne alter utrum his rebus juvemus, quibus bellum contra amicos nostros, instruatur, et foveatur. Lib. cap. IX.*

The things which cannot be lawfully carried to the enemies of our friends, and which are called contraband of war, are those which, in their present state, may be fit for, or of service in, war; and it makes no difference, whether they are of use in peace, or not. There are

very few instruments of war, which are not also of use out of war. We wear swords for ornament, we inflict punishment on criminals by the sword, we use gunpowder for amusement, and to testify public rejoicing; and yet there can be no doubt these articles fall under the denomination of contraband. About things of promiscuous use there would be no end of disputation, or if we were to follow the opinion of Grotius, and the various distinctions which he makes. In the treaties of nations, it will be found, all those articles are called contraband, which are suggested or occur to hostile belligerents, as being of service in carrying on war, whether they be warlike instruments, or stores, or materials, of themselves fit for war. Lib. I. Cap. X.

What holds of besieged cities or camps, applies also to hostile ports, which, surrounded by ships of war, are held to be besieged or blockaded. As prohibited, or contraband goods, if found on the confines of the enemy, are presumed to be destined for the enemy, so goods generally, found very near to blockaded ports, are confiscated, for no other reason, than that, from this fact, the purpose of trading with the enemy is tacitly, but legitimately inferred. There can be no doubt, if this appears from the documents found on board. It may be otherwise, if there be suitable proof of an alteration of the voyage in due time. Lib. I. Cap. XI.

If a neutral vessel carries lawful, and also unlawful, goods, destined for the enemy, and the ship is captured, are the ship, and also the lawful goods, to be confiscated, on account of the unlawful goods? *Omnino distinguendum, putem, an licitæ et illicitæ merces ad eundem dominum pertineant, an ad diversos; si ad eundem, omnes rectè publicabuntur, ob continentiam delicti; si ad diversos, qui navi imposuerunt; alteri alterius factum non nocebit. Haec est sententia Pactorum et Edictor-*

um, (of the Dutch republic). Si ex iis Jus Gentium metiamur, dicendum videbatur, nunquam naves, nunquam merces licitas publicari ob merces illicitas, quae eâdem navi vehuntur. Sed non autem, ex his, Jus Gentium efficere, quia Ratio, Juris Gentium Magistra, non patitur, ut omnino generaliter, et indistincte, haec intelligamus; nam, quod ad navem, distinguendum puto, an haec ad ipsum navarchum, an ad alios pertineat. Si ad ipsum navarchum, iterum distinxerim, an sciverit, ut plerumque scit, res illicitas navi suae imponi, an ignoraverit, ut si nautae, navarcho forte absente, aliquid illicitum in eâ condiderint. Si, sciverit, ipse est in dolo, quod navem suam locaverit ad usum rei illicitae, et navis publicabitur; secus, si ignoraverit, quia sic dolo caret. Tantumdem dicimus, si ad alios pertineat navis. Si navarchus navi imponat merces illicitas, insciis dominis, navis eorum non publicabitur; aliud autem juris, si ipsi imponi sciverint, atque ita versati fuerint in re illicitâ.

In dominis mercium, ex eâdem ratione, iterum distinguendum reor, an licitae, illicitaeque, merces ad unum eundemque dominum pertineant; an ad diversos. Si ad unum eundemque, omnes, puto, recte publicari. Sed quid, si licitarum mercium domini simpliciter sciverint, ab aliis etiam illicitas, in nave, imponi? hanc simplicem scientiam, licitarum quoque mercium publicationi, locum faciet? Sic velle videtur consulta, quidam: sed ejus sententiâ non uter, nec reperi, etiam, quod ei auctoritatem praebeat. Lib. I. Cap. XII.

The goods of friends or neutrals found in the ships of the enemy, are not liable to confiscation, by the general law of nations, although frequently declared so by treaty; but are to be delivered to the neutral owner, on payment of the stipulated freight; or rather, according to Bynkershoek, without payment of such freight,

because such freight has not been earned by the carriage of the goods to the destined port. *Imprudential meae, quod navi hostili, res meas imposuerim, satis poenas dabo, quod, meo periculo, meis que sumptibus, merces meas repetere, et avehere, habeam necesse.*

Vides, simpliciter, secundum Jus Francicum, amicorum Bona publicari eo ipso, quod in navi hostili deprehenduntur; quod non convenit ei, quod Grotius in *Hollandiâ* Senatû judicasse, et in legem verum esse, scripsit. Sed hæc pacta, quae recensui, (inter Regem Galliae et Ordines Gener. 1662, 1678, 1697, 1713, inter Carolum II. Angliae Regem, et Ordines Gener. 1674, et inter Carolum, Suecorum Regem, et Ord. Gener. 1675, 1679), posteriora sunt; non tamen, ut puto, sequenda, nisi inter eos, quos inter ita convenit. Ex ratione, utique, ejusmodi jus defendi non poterit: nam cur mihi non liceat, uti navi amici mei, quanquam tui hostis, ad transvehendas merces meas? Si pacta non intercedant, licet mihi cum hoste tuo commercia frequentare; quod, si liceat, licebit quoque cum eo quoscunque contractus celebrare. Quare, si ejus navem, operamque, conduxerim, ut res meas trans mare vehat, versatus sum in re, omni jure, licitâ. Tibi, quâ hosti, licebit navem ejus occupare; sed quo jure res meas, id est, amici tui, occupabis? Si, nempe, probem, res meas esse. Aliaquin, Grotio adsentior, ex praesumptione quâdam, pro rebus hostilibus esse habenda, quae in navi hostili inveniuntur. Lib. I. cap. XIII.

In the case of a neutral vessel loaded with the goods of the enemy, two questions arise; the one, whether the neutral vessel, the other, whether the hostile goods are to be confiscated?

By the general law of nations, a friendly or neutral vessel is not liable to confiscation, on account of carrying hostile goods; whether the master or owners knew or

were ignorant, that such goods were put on board; because, although they knew, they knew, also, at the same time, that they were doing a lawful act. *Sed nunc subsiste, et mecum quaere, an Jure Gentium peccet, qui, navi sua rem amici sui, quanquam tui hostis, transfert? Quo jure, tu, qui etiam amicus meus es, invadis navem meam, licet vehat res tui hostis? Ego, utrique amicus, utrique operam praestabo, in his, quae neutri vestrum nocent; et sic uterque etiam mihi operam praestabit, in rebus promiscuis. Hostis tuus rectè locabit mihi navem suam; et ego rursus meam hosti tuo loco.* * * * Omnino dicendum, navem amicam non publicari, ob res hostiles, ei impositas, sive sciverit, sive ignoraverit, dominus navis; utcunque enim sciverit, simul scivit, sese versari in re licitâ.

The other point is, whether the hostile goods on board the neutral vessel are liable to, or exempted from, confiscation.

Succedat altera inspectio, an, nempe ipsae res hostiles, in navi amicâ deprehensae, rectè publicentur? Quid, inquis, dubitabis, cum recte occupem, quicquid hostium est? Et tamen in § 14, Pacti marini inter Hispanos et Ordines Gener. 1650, simpliciter convenit, liberas fore hostium merces, in amicorum navibus repertas, "Vry schip, vry goed," ut Belgae lingua vernaculâ id efferant; exceptis tamen mercibus vetitis, instrumentis, nempe, belli. Quod non aliter intelligo, quam si ad hostes vehantur; alioquin prae reliquis, nulla publicationis causa. Ita inquam, simpliciter convenit, etiam, quod mireris, quatuor illis pactis, quae inter Reges Franciae et Ordines Generales intercesserunt, annis 1662, 1678, 1697, and 1713, nam si secundum haec, neque, res hostiles publicantur, quae in navi amicâ sunt, multo minus publicabitur ipsa navis amica. Igitur dicendum est, aut ab antiquo Jure Francico, de quo supra, dixi, plane

esse recessum, aut, quod est verius, haec pacta, exceptionum loco, esse habenda.

Sed quicquid sit, de ipsâ ratione magis, quam de pactis laborandum est. Eâ autem consultâ non sum, qui videam, cur non liceret capere res hostiles, quamvis in navi amica repertas; id enim capio, quod hostium est, quodque jure belli, victori cedit. Sin aias, me non recte occupare res hostiles in navi amica, nisi prius occupem navem amicam, atque ita vim faciam, rei amici, ut deprehendam rem hostis; idque non magis licere, quam hostes nostros aggredi, in amici portu, vel deprædari in territorio amici, velim animadvertas, catenus utique licitum esse, amicam navem sistere, ut non ex fallaci, forte, aplustri, sed ex ipsis instrumentis, in navi repertis, constat, navem amicam esse. Si id constet, dimittam; si hostilem esse, consteterit, occupabo. Quod si liceat, ut omni jure licet, et perpetuo observatur; licebit quoque, instrumenta, quae ad merces pertinent excutere, et inde discere, an quae hostium bona in navi lateant; et, si lateant, Quidni ea, jure belli, occupem? De eo sane, non dubitat Consultor, Consil Belg.; nec dubitant Leges Maritimæ in Consulatu maris c. 273. Lib. I. Cap. XIV.

The property in goods acquired by capture in war, remains, when they have been carried into the territory of a friendly or neutral state. But if goods, taken from the enemy, have come into the territory of an ally or confederate in the war, they are restored to the original owner, in the same way as if the ally or confederate had released or recovered them from the common enemy. Although the general law of nations permits that I should carry goods, captured from the enemy, into the territory of a neutral state, and there dispose of them, if I choose, particular states frequently enact regulations to the contrary, as a matter falling within the jurisdiction of each state. Lib. I. Cap. XV, XVI.

All privateers, or cruizers for capture at sea, must have the public authority of their respective governments; otherwise they are pirates. They must find security for their legal conduct, and their owners are held liable for damage illegally done by them. Lib. I. Cap. XVII, XVIII, XIX.

If a vessel, fitted out only for the purposes of trade, and not sent out to cruise for capture, but when pressed, shall overcome the enemy, and make a prize, or shall incidentally meet with booty, the prize shall belong to the master and crew, not to the owner of the vessel or cargo. Lib. I. Cap. XX. This, however, seems rather to be a matter for internal regulation.

It is not lawful, during war, to ensure the vessels or goods of the enemy. Lib. I. Cap. XXI.

CASAREGI.

Having thus in the works of Heineccius and Bynkershoek, seen what were the recognized doctrines of Maritime international law during war, in the earlier part of the 18th century, among the northern and central nations of Europe, we shall examine also what were the doctrines generally recognized among the southern states, in the works of Casaregi, the best of all the Italian writers on commercial law. Like Bynkershoek, he was a practical lawyer, and for many years judge in the court of the Grand Duke of Tuscany. And beside his edition and translation of the *Consolato del Mare*, his *Discursus Legales de Commercio*, in number 220, contain a great deal of prize law, embracing the judicial determinations of the Italian courts, during the 17th and 18th centuries, down to 1737. The following abstract contains the leading rules of Maritime international law during war, laid down by Casaregi, as recognized in practice by the Maritime states of the Mediterranean.

I. Mare liberum cuicunque est; et usus ipsius nemini potest inhiberi. Maris libertatem denegandam esse, nulla lex dicit. D. 211, No. 22, 24.

Mare omne, quod adjacet territorio terrestri alicujus principis, est de illius jurisdictione. Et super suo mari, vel^t portubus, potest princeps jurisdictionem, tam civilem, quam criminalem exercere; ideoque ibi Gabellas et Vectigalia, vehentibus merces, imponere, nec non navigationes permittere, aut prohibere. D. 136, No. 1, 2, 3, 4.

II. Bona Hostium de Jure Gentium adquiri possunt. De Jure Belli depraedantur etiam innocentes subditi, ut hostium vires atterantur. D. 212, No. 3, 48.

Ad hoc, ut merces, licite depraedentur, non sufficit, quod, in origine, fuerint inimicorum; sed requiritur, quod tales etiam fuerint de tempore praedationis. D. 24, No. 27.

Naves depraedari possunt et comburi, ratione status politici, ne hostes opulentiores fiant. D. 212, No. 34.

Depredatio rei existimatae inimicorum, lege humanâ, et divinâ, permittitur. D. 212, No. 55.

Naves inimicorum, de jure Gentium, in quocunque mari existant, depraedari possunt. D. 174, No. 5.

III. Naves et merces tunc demum fiunt capientis, quando per 24 horas prius fuerint detentae a praedatoribus, vel saltem fuerit navis, licet momento, intra eorum praesidia, non insecuta ab hostibus; (et dicitur etiam esse intra praesidia, quando praeda fuit reducta, intus naves inimicorum); vel nisi prius a patrono et nautis deterritis inimicorum adparatu, unito consilio, sponte data fuit; et in hoc secundo casu fit capientis, licet per 24 horas, non fuerit possessa, vel intra praesidia hostium non adfuerit. D. 24, No. 7, 8, 9.

IV. Hostium personae et bona, possunt ubique capi, etiam in alienâ jurisdictione, semper in respectu ipsorum

hostium, ut scilicet respectu eorum, praeda semper legitimo jure capi possit; sed non semper respectu principis territorii alieni; praesertim quando dominus territorii alieni, est amicus utriusque, tam depraedantis, quam depraedati. Et navis, iter faciens, in alieno territorio, non hostili, non licitè praedari potest. D. 24, No. 11, 13, 17.

Navis deferens merces mercatoribus degentibus in territorio principis amici, etsi in origine inimici, praedari non potest. Sed contrarium, in hoc puncto, decisum fuit, quia subditi principis inimici, licet degant in territorio alterius principis amici, non desinunt esse inimici, ac hostilis animi; ideoque eorum bona, quae per mare transeant, uti inimicorum, capi possunt. D. 24, No. 28.

Bona inimicorum onerata in navi amicâ, seu inimicâ, ad littus inimicum, vi tempestatis impulsa, praedari possunt. D. 24, No. 31.

Naves Exterae dicuntur esse sub protectione illius principis, cujus mare navigant, quando reperiuntur intra portus illius, aut in mari, ita vicino, ut illuc tormenta bellica adigi possent. Et si depraedentur ab inimicis, de jure restituendae sunt. D. 174, No. 12, 13.

Naves hostiles usque in portum, et mare alieni principis, persequi et depraedari possunt, si id fiat defensionis, et persecutionis causa. Jus defensionis nullum limitem, seu terminum, agnoscit. D. 174, No. 14, 15.

Cum nullus actus jurisdictionis fieri possit, in alieno portu, aut mari, non possunt naves in alieno mari existentes, ab aliis navibus amicis visitari, sub abtuitu suspicionis quod deferant res prohibitas. D. 174, No. 16.

Vexilla et insignia navis denotant ejusdem dominium. Praedator navis, vexillo inimicorum instructae, tenetur tantummodo alio rem mercem restituere. D. 211, No. 5, 6.

Merces inimicorum, de jure, legitime depraedantur, quamvis in navi amicâ deportentur. Et sic, in praxi, et consuetudine servatur. D. 214, No. 23, 27.

V. Regulariter, res, vel merces, in vectae in navibus hostilibus, praesumuntur esse hostiles, donec contrarium legitime probetur. Si vero probentur, non esse hostiles, capientium (vel Piratarum) non fiunt; sed restitui debent veris dominis, etsi apud hostes, vel in navibus hostilibus inventae; praesertim, si domini veri, non sint hostium subditi, nec hostilis animi; secus, si hostes in illis aliquod jus, ut pignoris, servitutis, retentionis habeant; nam in isto casu, etiam piratis (capientibus) adquiri possunt, licet inimicorum res non essent.

VI. Et similiter, e contrario, nec amicorum naves, praedari jure possunt, ob res inimicorum in illis inventas. Sed amicorum merces, praedari possunt, si navis, inimica, in qua oneratae sunt, eorum opera ac industria, aggressa fuerit alteram inimicam.

Regulariter bona eorum, qui auxilium praebent inimicis, vel confoederati cum iis sunt, praedari possunt. D. 24, No. 18, 19, 22, 23.

VII. Nullus privatus, sine licentia principis, exercere potest piraticam artem. D. 24, No. 25.

Naves exterae, etiamsi sint hostiles, et communium inimicorum, si habeant salvum conductum a principe, cujus mare navigant, non possunt visitari et molestari, ab illius officialibus, nec a navibus alterius principis, quamvis inimici, de praedari. D. 174, No. 10.

VIII. Navis, quamvis amica, denegans visitari, et recognosci, praedari potest, ob factam resistentiam. D. 24, No. 26.

Depraedatio navis non potest sustineri, ex solo capite resistentiae, quam fecit navis depraedata, dummodo ista non fuerit prima in aggrediendo—vexilli proprii variatio in aliud vexillum, juxta opportunitatem, ad iter tantum tutius peragendum, nullum praebet fundamentum, ad sustinendam depraedationem. Depraedatio navis et mercium videtur justa, si navis variavit vexillum, et fecit resistentiam. D. 116, No. 19, 21, 26.

IX. *Praedae captae per unam ex navibus navigantibus in conservâ, debent communicari alteri navi, quae ex casu fortuito, non potuit secum iter proseguì. D. 24, No. 32.*

X. *Navis per piratas (privateers) capta, et vendita, secuperari ab emptore, per dominum non potest, nisi refuso pretio, cum omnibus naulis. Et hoc procedit in piratis, (privateers) Exterae Gentis. Secus in piratis ejusdem Gentis. Verum, si navis non fuit redempta; sed recuperata, a piratis, recuperantes nullo modo, tenentur ad ejus restitutionem. D. 24, No. 1, 2, 6.*

XI. *Causa justa dijudicandi, merces et victualia, ad inimicos spectare, bonam fidem deprædationis, inducit. Praeda navis servanda, donec de ejus justitiâ concludenter doceatur; alias Praedator in dolo esse dicitur, et contra eundem in litem jurari, potest. D. 212, No. 56, 66.*

Navis, munita vexillo inimici, praesumitur inimica. Praeda navis non sustinetur, ex simplici et non probatâ assertionem deprædatoris. D. 213, No. 34, D. 214, No. 1.

Praedator insequens navem munitam vexillo inimici, excusatur etiam quoad damna et interesse. D. 213, No. 38.

Factum, et confessio prædatoris, praevalet cuicunque probationi in contrarium. D. 214, No. 6.

XII. *Arma, Ferrum, naves, et alia ad usum belli parata, prohibentur deferri ad Turcarum et Infidelium Regiones, quoad omne tempus, et omnem locum. D. 211, No. 41.*

WOLFF.

Among the great international jurists in the earlier part of the 18th century, there remain the celebrated Baron Wolff, (the follower, sed haud passibus aequis, of Leibnitz,) and his disciple Vattel. The former, how-

ever, in the ninth volume of his great work, entitled, *Jus Gentium Methodo Scientifica pertractatum*, published in 1749, and also in the abridgement he made of the whole of his large work, was chiefly occupied with the fundamental principles of the law of nations in general, and does not enter into the details of Maritime international law. Indeed, neither of these works contain much peculiarly applicable to the maritime department of the science; and we shall merely select the following texts.

§ 120. *Usus maris vasti consistit in navigando et piscando; juxta littora, in occupando in littore inventa.*
§ 121. *Mare vastum res usus inexhausti est. Nulli genti, vastum mare, etsi fieri possit, dominio suo subicere lecet; nec, salvo jure naturali, dominium ejus adquirere, valet. Nec gens ulla, magnam quandam oceani vel maris vasti, partem, dominio suo subicere licet.* § 122. *Nemo prohibendi jus habet, quo minus alter in mari vasto, naviget et piscetur.* § 123. *Si qua gens arcere velit aliam ab usu navigandi et piscandi, in vasto mari, injuriam ei facit.* § 129. *Maris autem quaedam partes, juxta littora, perinde ac terrae, occupari possunt. Et si qua gens partem quandam maris occupat, cum dominio, imperium in iis, simul occupat.* § 130. *Partes maris occupatae ad territorium illius Gentis pertinent, quae eas occupavit.*

COMMERCIIUM.

§ 199. *Naturaliter unicuique competit jus ad commercia, cum gente quacunque alia exercenda.* § 200. *gens nulla prohibere potest, ne qua alia, cum gente quadam, veluti cum seposita, commercia exerceat.* § 201. *Gens nulla prohibere potest ne qua alia, commerciorum causa ad Gentes remotas, per mare vastum naviget.* § 202. *Gens una cum altera pacisci potest, ne cum certa*

gente commercium exerceat, aut commerciorum causa, ad certa loca naviget, vel etiam ut, commercia sua in gratiam alterius, quomodocunque, restringat. § 203. Ex pactis commerciorum negativis, parti alteri nascitur jus, non patiendi, ut altera cum gente, quae commercia exerceat, aut commerciorum causa ad certa loca naviget, vel commercia extra restrictionem conventam, extendat. § 204. Inter Gentes, viget libertas commerciorum, se gens quaelibet cum quacunque alia commercium exercere potest, pro lubitu. § 357. Si pars maris, saltem quoad imperium, occupatum, usus gentium communis manet.

NEUTRALITAS.

§ 672. In bello, medii dicuntur, qui neutri belligerentium parti adhaerent; consequenter, bello se non immiscent. 673. Foedus neutralitatis. 683. Qui neutrarum partium sunt, ea praestare utrique belligerentium parti, debent quae Jure Gentium, debentur extra bellum; nisi expresse de quibusdam, aliter conventum, quae respectum ad bellum habere possunt. § 833. Hostes et res hostiles in territorio pacati capere, non licet.

§ 835. Quando bellum publicatur, concedendus est peregrinis, qui cives hostis sunt, sive ejus Gentis, cui bellum indicatur, intra certum tempus, tutus abitus.

HOSTIS.

§ 839. Res hostiles mobiles in territorio suo, intra debiti ac poenae modum, confiscari possunt, ab eo, qui bellum justum gerit. § 840. Qui justum bellum gerit, debitoribus quoque hostium, civibus suis, prohibere potest, ne creditoribus solvant debitori, immo, ut veniente die solutionis, solvant sibi, imperare. 859. Rerum mobilium captavum in bello, dominium acquiritur a summâ potestate. 860. Res hostiles mobiles, non ante

in daminio potestatis summae, sunt, quam, ubi ita detinentur, ut eadem pro lubitu de iisdem disponere possit. 861. Res in Bello captae, ab iis, quorum ante fuerant, adversus nullum possessorem, vindicari possunt. 888. Jure Gentium voluntario, quoad effectus, bellum utrinque habendum, pro justo. 892. Jure Gentium voluntario, occupatio bellica est modus acquirendi dominium, et imperium, belligerentium communis. 902. Quae ab hoste, vi bellica, recuperantur, postliminium habent. 909. Subditus belligerentis, sine mandato, aut concessione, summae potestatis, vim bellicam hostibus, aut rebus hostilibus, inferre, non potest. 910. Nec privata auctoritate naves in hostes armare licet.

VATTEL.

Such is a brief summary of almost all Baron Wolff has left on Maritime international law. But his able follower, Vattel, while, as Von Ompteda observes, he borrows the system, and follows exactly the plan and train of thought of his master, has greatly improved the original work; enters more into detail in Maritime international law, and gives a very distinct, though brief view of the rules of the general and common Maritime prize law, as recognized by the European nations, down to the middle of the 18th century, so far as not altered or modified by special treaties, of temporary or doubtful duration.

Although the work of Vattel was not published till 1758, we place our notice of it in this chapter, as so intimately connected with the preceding work of Wolff. But as it has been translated into English, and appears to be better known in England, than the works of the other continental jurists, we shall give only a short summary of its doctrine in the department to which our inquiries are confined, from what appears to be the

latest, if not the best edition, namely, that published at Paris in 1820.

After observing that all the subjects of powers at war with each other, are held to be public enemies, Vattel proceeds, Liv. III. chap. V. § 75, § 76, § 77, to state, that moveable goods or effects belonging to the enemy, *res hostiles*, remain such in whatever place they may be found; that goods belonging to neutrals, found in the country of the enemy, or in hostile vessels, are to be distinguished from the property of the enemy, provided the neutral clearly proves they belong to him; and that the sovereign of a state may, in the event of war, confiscate the debts due by his subjects to the enemy, or at least prohibit his subjects from paying these debts during the war; but that in later times, this rigour has been greatly relaxed, for the security of commerce, and in particular, public or national debts have been respected.

In treating of the law of war, with regard to things belonging to the enemy, Liv. III. chap. IX. § 160, Vattel distinguishes two rights; first, the right to take possession of what belongs to us, and which the enemy refuses to give up, with the addition of the expenses incurred in thus obtaining restitution, or what is due, as reparation for damage; second, the right to weaken the enemy, in order to disable him from continuing unjust violence, or the right to deprive him of the means of resistance. And in chap. XII. § 190, § 191, he propounds as the two leading rules of the *Jus Voluntarium*, or common law of nations; first, that with regard to its external effects, a regular war is to be held as just on both sides; second, that whatever is permitted to the one belligerent, in virtue of a state of war, is likewise permitted to the other.

In Liv. III. chap. VII. § 104, Vattel thus expounds

the rights and obligations of neutral nations, as then recognized. "Neutral nations in a war, are those who take no part in it, remaining common friends to both parties, and not favouring the arms of the one, to the prejudice of the other. While a neutral people wishes to enjoy securely that state, it must show in all things an exact impartiality between those who are at war with each other. For if it favours the one, to the prejudice of the other, it cannot complain, should the latter treat it as an adherent and ally of the enemy. The impartiality of neutrals relates solely to war, and comprehends two things; first, not to give assistance when not obliged to do so; not to furnish freely either troops, or arms, or ammunition, or any thing directly subservient to war; not to give any at all; not merely to give it equally. Second, in every thing which does not relate to war, an impartial neutral nation will not, on account of the existing quarrel, refuse to one of the parties, what it grants to the other. This, however, does not prevent it from directing its exertions to the promotion of the welfare of the state, in its negotiations, in its friendly connections, in its commerce. When such a reason leads to preferences in things of which every people has the free disposal, it merely exercises its own right; and there is no partiality.

"§ 106. When a war breaks out between two nations, all the others who are not bound by treaties, are at liberty to remain neutral; and if any one nation should wish to constrain them to join it, it would do them an injury, in as much as it would thereby encroach upon their independence, in a very essential point. But treaties of neutrality are useful for the maintenance of peace, and without such treaties, disputes often arise, as to what neutrality permits, or does not permit.

"§ 109. This subject presents various questions, which authors have discussed with warmth, and which have excited among nations more destructive quarrels. Nevertheless, the law of nature and nations has invariable principles, and can furnish rules for this matter, as well as for others. There are also things which have passed into custom and usages among civilized nations, and to which we must conform, if we do not wish to incur the blame of unjustly breaking the peace.

"With regard to the rules of the natural law of nations, they result from a just combination of the rights of war, with the liberty, the safety, the advantages, the commerce, and the other rights of neutral nations. And upon this principle, the rules which follow are founded.

"§ 110. Whatever a nation does in the exercise of its rights, and solely with a view to its own welfare, without partiality, without the intention of favouring one power to the prejudice of another, cannot, in general, be regarded as contrary to neutrality; and becomes such, only on those particular occasions, when it cannot take place without doing a wrong to one of the parties, who has then a particular right to oppose it. Thus the besieger has a right to interdict all entrance to the place besieged. Except in cases of this description, the quarrels of others do not deprive a people of the free disposal of its rights, in the prosecution of measures which its government may deem salutary.

"§ 111. With regard to the commerce which neutral nations may carry on with my enemy in his own territory, it is certain, on the one hand, that taking no part in my quarrel, they are not bound to renounce their traffic, in order to avoid furnishing my enemy with the means of making war upon me. If they showed a desire not to sell to me such articles, as they were taking measures to carry in abundance to my enemy, mani-

festly with the view of favouring him, this partiality would be a departure from neutrality. But if they merely prosecute their commerce solely and entirely, they do not thereby declare themselves against my interests—they only exercise a right, which nothing obliges them to sacrifice to me.

“On the other hand, when I go to war with a nation, my safety and security require that I deprive it, as far as is in my power, of whatever can place it in a condition to resist and to hurt me. Here the law of necessity developes and exerts its force. If that law authorizes me, when the opportunity occurs, to seize whatever belongs to others, may it not also authorize me to stop or arrest all things belonging to war, which neutral nations carry to my enemy? Although I may thereby make of these neutral nations so many enemies, it may be proper for me to risk doing so, rather than allow the unlimited re-inforcement of the people that actually makes war upon me. It is, therefore, suitable and conformable to the law of nations, which prohibits the multiplication of the subjects of war, not to place in the rank of hostilities, those sorts of seizure which are made upon neutral nations. After I have notified to them my declaration of war against such, or such a people, if they will expose themselves by carrying to it articles subservient to war, they will have no cause to complain, in the event of their merchandise falling into my hands; in just the same way as I do not declare war against them for having attempted to carry such goods. They suffer, it is true, from a war in which they have taken no part; but it is incidentally. I do not oppose myself to their right, I merely exercise my own; and if these right cross each other, and there is a reciprocal collision, it is the effect of inevitable necessity.

“This conflict happens every day in war. When in the exercise of my right, I exhaust a country from which

you derive your subsistence, when I besiege a city with which you carry on a lucrative commerce, I hurt you, no doubt; I occasion losses, inconveniences; but it is without the intention of hurting you; I do you no injury, since I exercise my own right. But in order to set bounds to these inconveniences, to allow to neutral nations liberty of commerce, as far as the laws of war will permit, certain rules have been adopted for observance, by what seems to be a sufficiently general concord, or agreement, among the European nations.

“§ 112. The first rule is, to distinguish carefully common commodities, which have no relation to war, from those which are peculiarly subservient to it. The commerce of the first ought to be entirely free to neutral nations; the powers at war have no reason to refuse this, or to prevent the transport of such merchandise to the country of the enemy; care for their security, the necessity of self-defence do not authorize it, seeing these things will not render the enemy more formidable. Any attempt to interrupt, to interdict commerce in such articles, would be a violation of the rights of neutral nations, and doing them an injury; necessity, as just observed, being the sole reason which authorizes any restriction of their commerce and navigation to the ports of the enemy. Accordingly, when England and the United Provinces agreed, by the treaty of Whitehall in 1689, to notify to all the States which were not then at war with France, that they would attack and declare lawful prize, every vessel destined for any of the ports of that kingdom, or which should depart from any such port, Sweden and Denmark, from whom some prizes had been taken, entered into a treaty in 1693, to maintain their rights, and by remonstrances, to procure satisfaction; and the two Maritime powers, acknowledging that the complaints of the two crowns were well founded, did them justice.

"The articles which are of particular use for war, and of which the transportation or conveyance to the territory of the enemy is prohibited, have been called contraband of war. Such are arms, warlike stores, wood, and whatever is of use for the construction and armament of ships of war, horses, and even victuals or provisions, on certain occasions, where there is a prospect of reducing the enemy by famine.

"§ 113. But to prevent the transportation or conveyance of contraband goods to the enemy, ought a belligerent to be confined to arresting them, or seizing them in transitu, paying the price or value to the owner, or is he entitled to have them confiscated? To be content with arresting or stopping such merchandise in transitu, would most frequently be a very ineffacious remedy; especially at sea, where it is not possible to cut off all access to the ports of the enemy. The rule, therefore, has been adopted, of confiscating all contraband goods which can be seized, in order that the dread of loss serving as a check upon the avidity of gain, may induce the merchants of neutral countries to abstain from the conveyance of such goods to the enemy. And certainly it is of so great importance to a nation which is at war, to prevent, as far as is in its power, the carriage to its enemy of things which strengthen and render that enemy more dangerous, that necessity, care for its safety and security, authorize it to employ efficacious means to declare, that it will regard as good prize, every thing of this nature, which may be attempted to be carried to its enemy. Wherefore, it notifies to neutral states its declaration of war; upon which the latter usually enjoin their subjects to abstain from all contraband commerce with the nations who are at war, declaring to these subjects, that if they are caught therein, the sovereign will not protect them.

"In this the customs of Europe appear now-a-days to be generally fixed, after many variations, as may be seen from the note of Grotius before quoted, and particularly from the ordonnances of the kings of France, of 1543 and 1584, which permitted the French only to seize contraband goods, and to keep them, on paying the value.* The modern practice is certainly more agreeable to the mutual obligations of nations, and more proper for reconciling their respective rights. The nation which makes war, has the greatest interest to deprive its enemy of all foreign assistance; and is, therefore, entitled to regard, if not absolutely as enemies, at least as people who care very little about hurting it, those individuals who carry to its enemy those articles of which that enemy has need for the war, and to punish these individuals by confiscation of their merchandise. If the sovereign of the latter, should undertake to protect them, it would be as if he wished himself to furnish that kind of assistance; a step undoubtedly

* It may be proper here to correct a mistake into which Vattel has fallen, in stating that, according to the early practice, French privateers were allowed only to seize contraband goods, and to keep them, on paying the value, (by implication), to the neutral owner. For, in looking into the ordonnances of 1543, § 39, and § 42, and of 1584, § 69, (as published in the Code des Prises) to which he refers, it will be found, French privateers were expressly authorized to capture goods contraband of war, although belonging to neutrals, found on board neutral vessels, and to have these goods and their proceeds adjudged as lawful prize, on payment of his droit, of a tenth to the admiral; or, if they wished to have these goods, or part thereof, for their own use, they were allowed to retain them, on payment of the droit of admiralty, according to a reasonable valuation. See also Valin, *Traité des Prises*, chap. V. sect. VI. § 1, § 2. Indeed, it would have been altogether absurd in the French law, to have held contraband goods not liable to confiscation, but only to seizure, on payment of the price or value to the owner, at the very time it held the carriage of such contraband goods, sufficient to warrant the confiscation of a neutral vessel.

contrary to neutrality. A nation which, without other motive than the thirst of gain, labours to strengthen my enemy, and dreads not to cause me an irreparable evil, that nation is certainly not my friend; and it gives me a right to consider and treat it as the ally of my enemy. In order, then, to avoid perpetual subjects of complaint and rupture, it has been agreed, and in a manner quite conformable to true principles, that powers at war may seize and confiscate all contraband merchandise, which neutral persons may be found transporting, or carrying to the territory of the enemy, without the sovereign of those persons complaining of it: as, on the other hand, the power at war does not impute to neutral sovereigns, such enterprises of their subjects. Care has even been taken to regulate these matters in detail, in treaties of commerce and navigation.

“§ 114. It is impossible to prevent the transportation of contraband goods to the enemy, unless neutral vessels, met with at sea, be visited and searched. Some powerful nations have refused, at different times, to submit to this visit. After the peace of Vervins, says Grotius, Queen Elizabeth, continuing the war with Spain, requested the king of France to permit that she should cause the French vessels which went to Spain, to be visited, in order to ascertain whether they did not carry warlike stores concealed; but this was refused, on the ground that it would afford an opportunity for favouring plunder and disturbing commerce.*

* As formerly explained, Sir Chr. Robinson has proved, that in this statement Grotius has been mis-informed, and though not intentionally, has misrepresented the fact; that Queen Elizabeth never requested Henry IV. to permit the search of French merchant vessels; that she merely, from confidence in him, had agreed to allow French vessels going to Spain, to pass unmolested, on a promise that they should not carry warlike stores; that the liberty thus conceded was abused; and that Queen Elizabeth therefore intimated, through her ambassador, that she could not any longer “allow of this toleration.” Coll. Marit. p. 49.

"At present, a neutral vessel which should refuse to submit to search, would be condemned on that account alone, as good prize. But to avoid inconveniences, vexations, and every abuse, the manner in which the search is to be made, is regulated by treaties of navigation and commerce. It is now recognized that credit must be given to certificates and other ship's papers, which the master of the vessel presents, unless they appear to be fraudulent, or there be good reason to suspect them.

"§ 115. If there be found on board a neutral vessel, effects belonging to the enemy, they are seized by the law of war; but naturally, the freight ought to be paid to the master of the vessel, who cannot suffer by that seizure.

"§ 116. The goods of neutral nations found on board a hostile vessel, ought to be restored to the owners, against whom there exists no right to confiscate them; but without indemnification for delay, decay, or depreciation. The loss which the neutral owners suffer in this case, is an accident to which they are exposed, by loading their goods in a hostile vessel. And he who captures the vessel, in the exercise of the right of war, is not responsible for the accidents which may result from it, any more than if his cannon-ball kills a neutral passenger on board a hostile vessel, who, to his misfortune, happens to be in the way.

"§ 117. Hitherto we have spoken of the commerce of neutral nations with the territories of the enemy, in general. There is a particular case where the rights of war extend farther. All commerce is absolutely prohibited with a besieged city. When I hold a place besieged, or a port blockaded, I am entitled to prevent any person from entering it, and to treat as an enemy, whoever attempts to enter it without my permission,

or to carry into it any thing whatever; for he opposes my undertaking, may contribute to its failure, and thereby subject me to all the evils of an unsuccessful war."

SURLAND.

Among the international jurists of the first half of the 18th century, we must also notice the German writer, Dr. John Julius Surland, who appears to have been the first jurist who composed a scientific, or methodical treatise, exclusively on the Maritime law of nations. His work, entitled, "*Grundsätze des Europäischen See-Rechts*," is unfortunately too short, being little more than a text book; but in the third part, the author treats of the duties or obligations which different nations have to observe towards each other, with reference to navigation and maritime trade.

In the first book of this part, he treats of the empire of the sea, of the high or open sea, of the appropriation of the sea to a limited width or extent, along the coasts, and harbours, or ports; of jurisdiction over seafaring people, to that extent; and the reciprocal obligations thence arising in the intercourse of the inhabitants of different states, or foreigners.

In the second book of the third part, Surland treats of the obligations of different nations in time of peace, under separate titles; of the permission to build and fit out vessels in foreign countries, of the liberty to carry on maritime traffic, of the privilege of certain flags, signals, &c., and of the duties of friendly ships which meet each other at sea. In the third book, Surland treats of the duties or obligations of different nations towards each other in time of war, and under separate titles. First, of the different kinds of war and enemies. Second, of reprisals. Third, of national fleets and pri-

vateers having commissions from government. Fourth, of pirates or sea robbers.

In the fourth and last book, Surland treats of the obligations of belligerent and neutral nations towards each other in separate titles. First, of neutrality generally. Second, of the duties of neutrals towards belligerents. Third, of the duties of belligerents towards neutrals. The two last of these titles contain the following doctrines.

"Tit. II. As the chief duty of neutral nations is in no way to interfere, or engage, or mingle in the war, so they must not, either openly or secretly, assist the belligerents in any such way, as that the one shall thereby sustain loss or damage, or reap an advantage before, or in preference to the other. No neutral nation is entitled to import victuals or provisions into blockaded ports. No neutral nation is entitled to carry to one of the belligerents, such articles as might, from their nature, become hurtful to the other. The nature of these hurtful articles cannot be defined generally, but is to be determined according to the circumstances of each people. These articles, which at all times belong thereto, are such as might be immediately used in war. But articles which are subservient, not so much to the purposes of war, as to the necessities and conveniences of life, may be carried to the enemy, without any breach of neutrality. Neutrals are held bound for greater security, on account of such goods, to permit a search of their vessels to the belligerent parties; and for that purpose, their ships must, upon a signal given by the other, likewise drop or cast anchor. To the persons dispatched to them, they must show their ship's papers. And that no deception or fraud may be here practised, it is not permitted to throw any papers overboard, before the search has taken place. Should any difficulties

arise therein, they must be determined in the court of admiralty of the searcher, but as quickly as possible. At the same time, as the ship's papers may have been lost, through many accidents, a vessel which has none, is not to be condemned for that single reason. Goods which belong to the enemy, being found in the ship of a friend, likewise, do not afford sufficient ground for making the vessel a lawful prize. And the ship of a friend may surely protect the goods of the enemy, provided only they be not contraband of war. The goods of a friend found in the ship of an enemy, nevertheless remain free, although the ship is with justice brought in as prize. Neutrals have no right to take one of the two parties under their protection, to grant them a passage, or, again, to set at liberty, the ships captured from them, if they have been brought into the ports of the former, in case this has not been settled by special treaty. Neutrals are not bound to allow the peace and quiet of their borders to be interrupted by foreigners, and may therefore repel all acts of violence in their harbours, and within their marine territorial jurisdiction. With the exception of contraband articles, trade with the belligerents is not forbidden to neutrals; they may thus allow the sale and purchase of captured vessels and goods made prize. But as they are not entitled, under this secret pretence, to take a side, or to mingle in the war, so they have thence no right to concede, or grant permission to their people or subjects, to take commissions of reprisal from foreign states. Commissions are granted by a foreign nation, with full power to bring in prizes under its flag. As duplicates of ship papers are of no avail, but to afford opportunities for fraud, they are likewise justly forbidden to neutral nations.

“Tit. III. In as much as neutrals must avoid seeking their profit and advantage, through the loss and damage

of the belligerents, in so much must the belligerents bear in mind, to keep clear of doing, through passion, any damage to neutrals, in their rights. But the rights of neutrals are just those to which friends lay claim.

"Since belligerents can merely hinder neutrals from carrying on that trade which supplies the enemy with articles adapted for war, so the latter must not interfere with, obstruct, or give trouble about what is done with the other articles of trade. As the search of the ship is allowed only for greater security, so belligerents, in exercising it, must not assume liberties which might be troublesome or annoying to their friends. And, should a ship of war venture to act in such a manner, the government is bound to afford speedy satisfaction to the injured, or sufferers.

"Since neutrals have no right to carry goods contraband of war to the enemy, so the belligerents may punish them by the loss of these goods; but they have no farther power over the subjects of a foreign state. Since it is free to neutrals to trade with the enemy, so it is also free to them to load their goods in hostile vessels; consequently, such goods do not, with these ships, fall a prize to the captors; the latter, however, do not thereby lose their right to the ships.

"As neutrals, by affording gratuitously, a free passage and protection to captured vessels, may show themselves more favourably disposed to the one belligerent party than to the other, but without departing from the middle course, so the latter may avail himself of the right in which the former has participated, or had the benefit. As neutrals are not bound to allow their quiet to be disturbed by foreigners, so a belligerent party has no right to pursue another belligerent under the guns of a fortress, or into the harbour, or to seize upon the territory of a neutral government. As neutrals have the

right to let vessels made prizes, be sold and purchased, so it is free to both belligerents to bring in such as prizes, and to alienate them. As it is not lawful for neutrals to receive and assume commissions as cruizers or privateers, so it is lawful for belligerents to treat the bearers of such commissions, when caught, as open public enemies."

From the preceding extract, it appears, that in 1749, Surland agreed in all respects with Heineccius and Bynkershoek, except in one important particular. Along with them, and in correction of the French practice, he laid down the rule, that neutral goods on board hostile vessels, are not thereby liable to confiscation. And he recognized the right of search, as necessary for the safety of belligerents, and for the confiscation of contraband goods, and of goods destined for blockaded ports. But adopting, in this respect, the rule for which the Hanse towns first and long contended, but never observed, which Groningius supported in 1697, in behalf of Sweden and Denmark, and in favour of Louis XIV. and which we shall see soon, was so powerfully urged in the latter part of the 18th century, he argued, that the ship of a friend may surely protect hostile goods, provided they be not contraband of war. And thus rather pleaded for the admission and adoption, than testified the actual recognition of such a rule. In support of this rule, he refers to no authority, except to a treaty between Denmark and France in 1662, and to a *Traité de la Marine* of 1650. But while it seems doubtful, whether the terms of these treaties refer not to hostile goods, as distinct from neutral contraband, but to other neutral goods, not contraband, he maintains not very consistently, that although the hostile cargo is not, the hostile vessel is liable to confiscation, on the sole ground of its being the property of the enemy. With this ob-

servation, we rank Surland, along with the jurists of the earlier part of the 18th century, rather than along with Hübner and his followers, who pushed the claims of neutrals so much farther, and to so great a height.

SECTION II.

Internal statutes, ordinances, and judicial determinations of Maritime states, as exhibiting their administration of Maritime international law in war, during the first half of the 18th century, or from 1701 to 1756.

HAVING thus surveyed the Maritime law of nations, from the close of the 17th, to the middle of the 18th century, as contained in the writings of the more eminent jurists of that period, we shall next contemplate that law, as practically administered by the principal Maritime states, as exhibited in their statutes, ordinances and edicts, and in their judicial determinations, recorded in their own national writers in that department of law. In this, indeed, we have already made some progress in our review of the eminent jurists before noticed. For with regard to the south of Europe, and the commercial states of Italy, we had in Casaregi, and with regard to the central Maritime states of Europe, we had in Bynkershoek, the practice, as well as the principles of Maritime international law, as administered by these nations. It only remains, therefore, to notice the other great Maritime states in the west and north of Europe. And with regard to France and Spain, we cannot do better than revert to the national works of Valin, viz., his *Commentaire sur l'Ordonnance de la Marine*, and *Traité des Prises*, and of el Caballero d' Abreu, viz., his *Tratado sobre las Presas Maritimas*.

FRANCE.

With regard to France, it appears that in the ordonnances of 1704 and 1744, that government adhered, in most respects, to the celebrated ordonnance of 1681. And accordingly, while she observed, in her administration of Maritime international law, the great principles of that law recognized among the European nations generally, as expounded by the able Jurists before reviewed, France continued to deviate from that general law, in two important particulars; in confiscating neutral vessels, on the ground of their carrying hostile goods, and in confiscating neutral goods, on account of their being conveyed in hostile vessels.

The former of these rules was so far derogated from, by the reglement of 1744, in as much, as it was thereby declared, that in this case, the confiscation should comprehend only the goods of the enemy on board, and that the neutral vessel should be released with the rest of her cargo. But Valin informs us, *Traité des Prises*, Tom. I. p. 63, that this new arrangement was adopted merely in accordance with the treaties which had then been concluded with certain friendly or neutral powers; that it might be changed in future; and that the principle established by the ordonnance of 1681, ought not to be lost sight of; according to which, when there are enemy's goods in a vessel, the whole is confiscated. So far was the neutral flag from being then held by France to cover the hostile cargo.

By the ordonnances of 1543, 1584, and 1681, all contraband goods, including horses and equipages, and still more troops, were prohibited from being carried to the enemy, and were subjected to confiscation, although the property of neutrals. But under the reglement of 1744, only the prohibited articles were subjected to

confiscation, and the neutral vessel was released with the remainder of her cargo. Provisions for the support of life were confiscated, only when destined for besieged, or blockaded places. And contraband goods were subjected to confiscation, only when transported for the service of the enemy. But, if the property of the enemy, contraband goods, under the ordonnance of 1681, continued to involve the confiscation of the vessel, and of the rest of the cargo, with the exception introduced by the reglement of 1744, in favour of certain neutral vessels.

Except such contraband goods, the subjects of friendly or neutral powers, might trade freely with the enemy, carry to their territory their own goods and merchandise, and take in exchange or payment, the effects of the enemy; provided they conformed to the regulations made on the subject in 1704 and 1744. First, neutral vessels departing from a neutral port, and loaded with merchandise of the growth or manufacture of the country, in order to carry them directly to any other country, even to that of the enemy, were held not liable to capture by French privateers, unless the cargo was on account of the enemy, or there were on board the vessel contraband goods. Second, neutral vessels departing from the ports of any other state than their own, even those of the enemy, and loaded for the account of others than the enemy, although there might be merchandise taken on board in the ports of the enemy, were held not liable to confiscation, provided these vessels returned directly to one of the ports in the dominions of their own sovereign. Third, neutral vessels departing from a neutral port, in order to go to another port, likewise neutral, were held not liable to seizure, unless they were loaded with merchandise of the growth or manufacture of the country of the enemy; in which

case, the merchandise was held good prize, but the vessel was released. Fourth, when a neutral vessel departed from a port of a state, the ally of France, or neutral, in which vessel there were goods, contraband or of the growth or manufacture of the enemy, the goods were held lawful prize, but the vessel was released, even although she was going to a port belonging to the enemy of France.

The Danes, Swedes, and Spaniards enjoyed special privileges by treaties, relaxing the restrictions just alluded to. But with regard to all other neutrals, the rule, when Valin wrote, (about 1760), was, that only the goods of the enemy, or of the growth or manufacture of their country, with contraband goods, were subject to confiscation; and that the vessels with the rest of their cargo should be released, conformably to the fifth article of the reglement of 1744, before mentioned; which, Valin adds, would continue till the revocation of that article, suspensive of the principle established by the ordonnance of 1681.

The reglements of 1704 and 1744, contain several other provisions with regard to the residence of the subjects of neutral states, the neutral character of the officers and crew, and the documents to be admitted in proof of neutral property. But as Valin observes, since under the relaxations introduced by the reglements of 1704 and 1744, the merchandise before specified were still subject to confiscation, the neutral vessel might still be arrested, and brought into a port of the kingdom, without there being any ground for damages and expenses, although the vessel might be found entitled to be released, with the remainder of her cargo. *Traité des Prises*, Tom. I. p. 75.

"Such are the laws," continues Valin, "which, in general, have regulated the conduct to be observed by

cruizers, with regard to the maritime commerce of the subjects of allied, friendly, or neutral Princes. At different times, however, and for particular considerations, there have been exceptions in favour of certain neutral powers; for example, in the war terminated by the peace of Utrecht, in favour of the Swedes and Danes; and in the immediately preceding war, (terminated by the treaty of peace of Aix la Chapelle in 1748), in favour not only of the Swedes and Danes, but also of the Hanse towns and the Dutch. And these exceptions, very extensive, and, consequently, so much the more advantageous for these nations, are contained in the reglement of 1744, and also in the letter of the King to the Admiral. But for the very reason that these are exceptions, they may cease. And the rule which they confirm, will subsist always in its generality."

The right of visitation and search, also, continued to be rigidly enforced by the French government when Valin wrote, at the close, or rather after the lapse of the period we are now contemplating, as ending in 1756. "Le Capitaine (says Valin, *Traité des Prises*, Chap. V. Sect. VIII. § 1, § 2), Le Capitaine d'un Corsaire, qui est en regle, est autorisé à courir sur tous les navires, qu'il rencontre en mer, à les sémoncer, les reconnoître, et les visiter, &c. D'ou il s'ensuit, que tout navire sémoncé est obligé de se laisser visiter, en obéissant à la sémonce. 2. En consequence, l'article 12 de notre ordonnance, dit, que tout vaisseau, qui refusera d'amener ses voiles, après la sémonce, qui lui en aura été faite, par les vaisseaux du Roi, ou ceux de ses sujets, armés en guerre, pourra y etre contraint par artillerie, ou autrement; et qu'en cas de resistance, et de combat, il sera de bonne prise."

In almost all other respects, Maritime International law during war, continued, with some slight variations,

to be administered by France, till the middle of last century, under the ordonnance of 1681; of the provisions of which we formerly gave some account.

SPAIN.

With regard to Spain, the author has never been able to procure a copy of the original Spanish work of the Chevalier d'Abreu, entitled, *Tratado sobre las Maritimas Presas*, published at Cadiz in 1746; but he some time ago, procured from Paris, a translation of that work, with notes by M. Bonnemant, published in 1802. The notes furnished by that French lawyer to the edition of this French translation, will be of use afterwards, in ascertaining the administration of prize law by the French Republic, during the short period of its existence. At present, we only consider the text, as translated from the original Spanish.

The work is divided into two parts. In chapter I. of part first, D'Abreu treats of the nature of Maritime captures as prize, of the advantages to be procured from them, and of the pre-requisites to render them legal. In chapter II. he examines what documents must be on board merchant vessels, to protect them from the pursuit of national cruisers or privateers. In chapter III. he enquires into what port the cruiser ought to carry his prizes, and for what time he must have them in his possession, in order to acquire the property. Here he observes, jurists are not agreed, or at one; some holding that the prize must be carried into a place of safety to transfer the property; others, that possession for twenty-four hours is sufficient; and he is inclined himself to reject both these opinions, and to hold that effects taken from the enemy, belong to the captor, as soon as the seizure is completely established, without requiring other formalities, or the lapse of any particular space of time.

He next observes, that authors are also divided, with regard to what secures to the cruizer the property of the merchandise on board the captured vessel; some maintaining that it is not enough he has taken them on board his vessel, because a vessel is not a place of safety; that they must be carried into some harbour, or under the cannons of some fortress. Others are of opinion, that the transshipment of the goods into the vessel of the captor, secures to him the property. And D'Abreu himself approves of the latter opinion, as the terms *intra præsidia* should not be construed so very strictly and literally, that the vessel must be actually taken into a harbour, if it was otherwise morally certain that the prize could not be carried off.

In chapter IV. D'Abreu enquires, whether it is lawful for cruizers to attack the vessels of the enemy, in the harbours of neutral powers. And, while he clearly establishes the negative, he notices the exception made by many writers, of an engagement commenced in the open sea, and prosecuted till it terminates in neutral territory; maintaining the illegality of the capture even in the latter case, especially if inconsistent with the stipulations of treaties.

In chapter V. he maintains it is not lawful for cruizers to attack the vessels of the enemy, in the seas adjacent to the harbours and coasts of neutral powers, at least within two leagues of the coast, or within the reach of a cannon-ball.

In chapter VI. he enquires, whether prizes carried into the ports of a common ally, ought to be restored to their former owner; and decides the question, according as the property of the prize has, or has not, been transferred to the captor, before entering the port.

In chapter VII. he expounds the *ordonnance des Courses*, as declaring that every vessel which shall re-

fuse to lower her sails, after having been summoned to do so, by armed Spanish ships of war, may be constrained to do so, by artillery, or otherwise; and, in case of resistance or combat, may be captured as lawful prize.

In chapter VIII. he explains, that by the law of Spain, the merchandise and other effects belonging to friends or allies, if found on board the ships of the enemy, are lawful prize. And in this respect, it thus appears, Spain, as well as France, deviated from, and exceeded the limits of the common law of nations.

In chapter IX. he enquires, whether the goods of enemies, found on board the vessels of friends or allies, are lawful prize, and whether in this case, even the vessel which carries them, may be captured; distinguishing two points; the one concerning the merchandise, the other concerning the vessel which carries the goods; and as the fact, relative to the practical decision of these interesting questions, has not always been correctly represented, it may be proper to quote this chapter more fully, as showing the views entertained, and the practice observed by the Spanish government, between the years 1730 and 1750. § II. "*Le droit commun, paroît décider contre la saisie de ces marchandises, parce que, pour les trouver, et les reconnoître, il faut aborder le navire, le traiter avec violence, et en user avec un ami, comme avec un ennemi.*" § III. *Malgré cela, cependant, le droit des nations, et celui de la guerre, fournissent toutes sortes de raisons pour autoriser la capture de ces effets; quand il y a prouvé, qu'ils appartiennent à des ennemis. Ils ont, pour ainsi dire, un vice réel, et inhérent, qui les suit partout, et qui subsiste indépendamment du lieu, ou du vaisseau, qui les contiennent.*" Salcedo, *De Contrabando*, cap. 7, No. 16. § IV. "*De pareils vices sont reconnus par les lois; elles ont décidé, qu'une chose, qui a été volée, en contracte un*

tellement incorporé avec elle, que quiconque en fait l'acquisition, n'en est jamais le possesseur legitime.

*** Ainsi les marchandises appartenant aux ennemis, portent, pour ainsi dire, un caractère indélébile, qui les rend de bonne prise, sur quelque bord, qu' on les trouve." § V. Le chapitre 275, du consulat de la mer, milite aussi en faveur de ce sentiment. "Il y est dit, que, 'si le navire, qui aura été pris, appartient à des amis, et sa cargaison à des ennemis, l'armateur pourra obliger le patron de ce navire à lui livrer ce qui appartient aux ennemis, et même tout ce qui sera dans son bord, jusqu' à ce qu' on donne lieu au recouvrement.' La patente de course qu' on donne, aux armateurs, est encore plus decisive, par la formule, qu' employoit l' enfant Don Philippe, en vertu du pouvoir, qu' il en avoit eu de sa Majesté; il étoit permis aux capitaines armateurs de poursuivre indistinctement, d'attaquer, de prendre, et de saisir, les navires et les effets, qu' ils trouveroient appartenans aux ennemis de la Couronne, sans que la nécessité, où ils pouvoient être, de s'emparer d'abord d' un vaisseau ami, de l'aborder, de lui faire caler les voiles, fut un obstacle à la prise sus dite. Comme on ne peut savoir, avec certitude, sans l'examen des pieces et des registres, que porte ce vaisseau, s' il est ami, ou ennemi, il s'ensuit, qu' on ne commit pas une violence injuste en voulant les examiner, parce, que sitôt qu' on sera assuré, qu' il est ami, on le mettra en liberté, et s' il est ennemi, il sera saisi justement par l' armateur. Les particuliers n'ont aucun motif de prétendre à ce sauf-conduit, ni d' empêcher les hostilités et les effets d' une juste guerre; qui sont de saisir les biens des ennemis, et de le priver de l' avantage du commerce, principalement de celui, qui se fait par le moyen des vaisseaux des particuliers, que les ennemis fretent le plus souvent. § VI. La regle generale, que nous venons d' établir,

souffre deux exceptions; dont la première est fondée sur le droit commun. Si les marchandises appartenant aux ennemis sont hypothéquées, pour quelque cause, que ce soit, en faveur du capitaine du navire ami, qui les porte, on ne peut légitimement s'en emparer; il est évident, que dans ce cas, on ne peut point vérifier, qu'elles appartiennent à l'ennemi. § VII. La seconde exception, appuyée sur des conventions, et des traités particuliers, regarde les marchandises ennemies chargées sur des vaisseaux Français ou Hollandais, et non sur ceux des autres états, avec lesquels l'Espagne n'a pas fait les mêmes conventions. En vertu des traités passés avec ces deux nations, leurs effets doivent être exemptés de toute confiscation dans ces conjonctures, et les marchandises Espagnoles doivent jouir réciproquement du même avantage. (D'Abreu here quotes the treaty of the Pyrenees, and the treaty of The Hague of 1650.) § VIII. L'intention des puissances dans une telle convention a été de favoriser le commerce de leurs sujets respectifs, d'embarrasser celui des étrangers, et de mettre à couvert de toute insulte, tout ce qui navigueroit sous leur pavillon; car celui des ennemis, qui ne jouit point de ce privilège, n'est d'aucun asyle, et l'on peut emparer de tout ce qui se trouve à bord des vaisseaux, qui le portent. Si ces puissances n'ont point compris dans leur convention, les marchandises de contrebande, c'est afin de prévenir les préjudices sensibles, qui pouvoient s'ensuivre; attention, qu'elles devoient avoir, des-lors qu'elles n'avoient en vue, que l'avantage réciproque, et l'honneur de leur pavillon."

D'Abreu proceeds to the second point, which he proposed to discuss in this chapter. § IX. "Le second point, regarde le vaisseau même, qui porte le bien de l'ennemi; et l'on demande, s'il est pour cela, sujet à confiscation. Cette question ne puit pas regarder les

vaisseaux Français ni Hollandais; car, si les traités cités ci-dessus, ont arrêtés, que les marchandises des ennemis trouvées à bord des vaisseaux de ces deux nations ne sont point sujettes à saisie, les vaisseaux eux-même, seront à plus forte raison à couvert de cette violence. La difficulté ne peut donc tomber, que sur les batimens des autres nations, quoique alliées, ou amies, avec lesquelles, il n'y a rien de regle sur ce point. § X. L'on pourroit decider, que ces vaisseaux sont de bonne prise, et s' appuyer des raisons suivantes." D' Abreu here states the reasons and the authorities on which this doctrine is founded, such as Bobadilla, Lib. 4, Politicor, cap. 5, No. 31, ubi multos citat, and Salcedo de Contrabando, cap. 16, No. 4, and particularly the Spanish Ordonnance des Courses of 1718; viz. "Seront de bonne prise, les navires, qui porteront des marchandises appartenant aux ennemis, de même, que les effets des Espagnols, trouvés à bord de vaisseaux ennemis." But he adds, § XIV. "Malgré le poids de ces raisons, nous croyons que les traités cités ci dessus, faits avec la France, et la Hollande, sont plus conformes au droit commun, et que par conséquent, les vaisseaux des amis ou allies n' encourrent point la confiscation, pour porter des effets des ennemis. Cette decision porte sur une distinction tres naturelle. Où le vaisseau appartient à des allies, ou à des sujets de la Couronne. Dans le premier cas, il n' est aucune raison, qui en puisse autoriser la saisie, parceque le commerce, qu' a cet allié avec des ennemis, qui ne sont point ceux de son prince, ne lui est point interdit. Si ce vaisseau appartient à des sujets de la Puissance, qui est en guerre avec le Souverain des propriétaires des marchandises, qu' il transporte, la confiscation est très juste; le maitre du batiment ne doit pas ignorer, que depuis la declaration de la guerre, toute communication, et tout commerce lui sont inter-

aits avec les ennemis de l'état, et que la prise de son vaisseau doit être la juste punition de sa désobéissance, et des services, qu'il rend aux ennemis de son Prince."

In chapter X. D'Abreu enquires, whether the vessels of friends or allies which carry arms, ammunition, or warlike stores generally, to the enemy, are lawful prize. And here, also, it may be proper to quote rather fully.

§ II. "Tout état doit être fort éloigné, de favoriser les ennemis de son allié, en leur fournissant par le commerce, ce qui peut les rendre plus puissans, et reculer la paix. Par conséquent, on peut légitimement s'emparer de tout, ce qu'on leur fournit, ce qui peut se reduire, aux armes, et aux vivres. § III. Pour ce qui est des armes, la defense d'en porter aux ennemis, est si absolue, qu'il n'y a aucune sorte de droit, qui ne l'établisse. La raison, qu'on en peut donner, est très-convaincante; c'est, que quiconque fournit des armes à nos ennemis est censé favoriser leurs hostilités; chose qui est expressément defendue aux alliés. En s'emparant, on ne fait, donc rien, que de juste. Salcedo de Contrabando. § VII. La meme chose a été arrêtée par plusieurs traités faits entre les puissances de l'Europe. § VIII. On nous objectera, peut être, que cette defense peut bien obliger les sujets du souverain, qui la fait, mais non pas ceux d'un autre souverain, qui n'ont point d'ordres à recevoir du premier, qui ne peut point les gêner, dans leur commerce, ni les empêcher de transporter, où bon leur semblera, les ouvrages de leur industrie. § IX. Mais qu'on fasse attention, que le transport d'armes chez les ennemis, n'est pas defendu, en vertu de quelque ordre particulier; il l'est par le droit general de la guerre, qui n'est point limité à aucun territoire, ni district spécifié. Or ce droit general, autorise à confisquer, tout ce qui est transporté de cette nature, soit par les sujets propres, soit par des ét-

rangers. § X. Le transport des vivres ne paroît pas défendu, avec la même rigueur, que celui, des armes, et de munitions de guerre. Car quoique les munitions des bouches soient très nécessaires, pour faire la guerre, et qu'elles favorisent l'opiniâtreté de l'ennemi, elles produisent cet effet bien moins directement, que les armes. Ainsi le transport de celles-ci, est il défendu aux alliés, ainsi qu'aux sujets propres; au lieu que le transport des vivres ne l'est, qu'à ces derniers. § XII. Tout ce que nous venons de dire, établit, qu'on peut s'emparer des vaisseaux, qui porteront des armes et des munitions de guerre, aux ennemis; et que ceux, qui leur porteront des vivres devront être à couvert de violence, à moins que ces vivres ne soient, pour une place assiégée, ou bloquée."

The second part of the valuable treatise of D'Abreu, is less interesting, generally, inasmuch as it is chiefly occupied with those matters, which, in the intercourse of nations, it belongs to the government of each independent state to arrange; and we shall, therefore, notice at any length, only those matters which involve points of clearly international right or obligation.

In chapter I. he discusses the question, whether private vessels, which have received commissions from two different princes, be not lawful prize; and he concludes they are so, unless the two sovereigns be of the same party or alliance, and have the same interest in the war. The import of the second chapter seems to be, that the commander of a Spanish private ship of war is, in general, bound to carry his prize into the port at which he fitted out his vessel; but if rendered necessary by circumstances, may take the prize into any other port of the kingdom, or even into a foreign port. And with regard to foreign privateers taking refuge in Spain, a distinction must be made, according as the vessel cap-

tured by the foreign privateer has been taken from the enemies of Spain, or from the allies of Spain, or neutral nations; and according as there may be found on board, goods belonging to Spaniards, or to the allies of Spain, or to the common enemy; that, if taken from the allies of Spain, or neutrals, the privateer shall not remain longer than twenty-four hours, unless detained by tempestuous weather; that, if taken from the common enemy, the privateer may not only enter a Spanish port, but remain with the prize; that, if the goods on board the prize belonged to Spaniards, they must be restored; that, if they belonged to allies, they cannot be sold, but must also be restored; that, if the goods on board have been taken from the common enemy, there is no room for restitution either to Spaniards or allies.

In chapter III. D'Abreu enquires, who are the competent judges to determine the differences which may arise, touching the legality of prizes; and explains that the official persons appointed by the king, are the only competent judges, not only of prizes captured by Spaniards, but also of those brought by foreigners into Spanish ports.

In chapter IV. he enquires, what difference there is between prize and contraband; and whether, if a merchant vessel carries contraband goods, a privateer is entitled to seize them, or whether they ought to be confiscated for the profit of the crown. But, in this investigation, he does not seem to mark the distinction between contraband of war, including only articles directly subservient to war, and general contraband, comprehending all articles of which the importation or exportation may be prohibited by the laws of particular states, or are admitted only, on payment of certain duties or taxes.

In chapter V. D'Abreu discusses the interesting

subject of re-captures. Many authors maintain, that whatever is re-captured from the enemy ought to be restored to the former owner, whether the re-capture has been made immediately after the capture, or some time has intervened between these events, without the re-captor being entitled to anything: because, in rescuing the prize from the enemy, the re-captor did nothing more than his duty, which is to defend his fellow countrymen. Other authors entertain a different opinion, and distinguish two cases. The re-capture has been made either at the time of the engagement or combat, or some time afterwards, when the captor had already carried his prize into a place of safety. In the first case, these authors maintain the re-captured vessel and cargo ought to revert to the former owners, who are held not to have lost the property. In the second case, the re-captured vessel and cargo belong to the re-captor; because, seeing the enemy had put them in a place of safety, the right which he thereby acquired over them, annihilated that of the former possessor, and rendered him the sole owner. Finally, there is a third opinion, which admits of no restitution, whether the re-captor has been made immediately or a considerable time after the capture; because, he who has exposed his liberty, his fortune, and even his life, to recover the goods of his fellow countrymen taken by the enemy, ought to be allowed at least to keep them, as a just compensation for the dangers and the expenditure which he has incurred; and also because, if the re-captor had been vanquished by the enemy, it is certain he would have had no action against the original possessor, to indemnify him for the loss which he might have sustained. The Spanish *Ordonnance des Courses, or de la Marine*, not adopting entirely any one of these opinions, decided the matter in these terms:

Si un navire de quelqu' un de mes sujets est repris sur les ennemis, après avoir été en leur pouvoir pendant vingt-quatre heures, il appartiendra au Répreneur; mais s' il est repris avant ce terme, il devra être restitué à son premier maitre, excepté le tiers, qui appartiendra au Répreneur. Tom. II. p. 90. Farther, in the event of any of the goods found in the re-captured vessel being destined for the enemy, they were adjudged to the recaptor.

In chapter VI. D'Abreu shows, that, although on strict legal principle, the property of the captured vessel and cargo does not pass to a pirate, yet the Spanish ordonnance placed re-capture from pirates on the same footing as re-capture from the enemy, upon general grounds of expediency, and to encourage the destruction of pirates. Chap. VII. The official persons appointed by the crown, are the only competent judges in cases of re-capture. From chap. VIII. it seems to have been allowed to the privateer to hoist a different flag from the national one, when the vessel of the enemy is first perceived. But as soon as combat commenced, a plurality of flags was prohibited.

From chap. IX. it appears, the privateers were to conform to the directions of the Ordonnance des Courses; but in cases not foreseen or provided for, they might be guided by the stipulations of treaties, or even by the latter, in preference to the ordinary rules, provided the treaties were still in force. If neither the positive law, nor treaties, provided for extraordinary cases, they behoved to conform to the usages and customs, received and invariably observed in navigation.

From chapter X. it appears, that, when merchant vessels were met in the open sea by the king's ships of war or privateers, the latter behoved to send a boat to board the merchant vessel, with two or three men only,

to whom the master or captain of the vessel behoved to present his passport or ship's papers. Ce Règlement, says D'Abreu, fait dans une traité particuliere, (de 1667, avec l' Angleterre) doit avoir une execution generale, et est très conforme à raison. C' est à l' armateur de s' assurer, si le marchand a les pieces requises, et s' il n' a point de contrebande. Le seul moyen d' y parvenir, c' est de passer à bord du vaisseau marchand, afin de prévenir, le faux exposé, que celui ci pourroit lui faire. Tom. II. p. 143.

Chapter XI. Captures are valid after the conclusion of peace, as long as that event has not come to the knowledge of the commander of the cruizer. Chap. XII. The burden of proving the legality of the prize lies upon the captor. Regular procedure in the adjudication of prize is indispensable. Chap. XIII. If among the captured goods, there be found some, which it is averred, do not belong to the enemy, it is incumbent on the captor to prove the fact. Chap. XIV. When it is denied that the goods found on board a vessel belonging to a friendly or allied power, belong to the enemy, the proof of the allegation is incumbent on the captor, especially, when the property cannot be ascertained by marks, and the examination of persons of skill. Chap. XV. Although the procedure in prize causes is directed to be summary, yet, if farther proof be offered, such causes ought not to be decided solely upon the documents found on board the captured vessel, and time ought to be granted to the party desiring it, to produce other documents, and even the judgments pronounced upon such proofs, are subject to appeal. In chapter XVI. the author treats of the share or interest which the king of Spain has in prizes; and of the duties which the owners of privateers, whether Spaniards or foreigners, who bring their prizes into Spanish ports, have to

pay; and discusses whether those who have assisted in capturing the vessel, have a claim to a share.

GREAT BRITAIN.

With regard to the administration of Maritime international law by Great Britain, during the first half of the 18th century, down to the war of 1756, it appears, that having relinquished the proclamation in which, in 1689, she had been persuaded to join with the United Provinces against Louis XIV., which prohibited all trade with the enemy, and declared a general blockade of all the ports of France, she continued to adhere to, and enforce the rules which Grotius and Loccenius had expounded in the 17th, and which Heineccius, Casaregi, Bynkershoek, and Vattel, had farther illustrated in the 18th century. It appears, also, from the preceding short review of the works of Valin and D'Abreu, and will still more distinctly appear from a perusal of these works, that the rules which Britain observed and enforced, were just the rules which the two great Maritime states of France and Spain then observed, with the exception of the governments of these kingdoms enforcing generally the more rigid and severe rules of holding a hostile cargo to confiscate a neutral vessel, and a hostile vessel to confiscate a neutral cargo, under certain relaxations by special treaty with each other, with Holland, and with the Hanse towns.

The prize act of Queen Anne, which, we have seen, was, by no means, the first English prize act, and the proclamations consequent thereon, gave greater encouragement to the officers of the royal navy, and to private cruizers against the enemy, by enlarging their interests in the prizes which might be captured by them; but did not alter, in the administration of prize law by Great Britain, any of the rules of that law previously observed in practice.

In 1711, England and Holland appear to have had a dispute with Charles XII. of Sweden, relative to a proclamation issued by that king, prohibiting all commerce with the ports of the Baltic, which the Czar of Russia had, in the course of the war then existing, taken from Sweden. But this complaint appears to have been groundless, and to have proceeded from interested considerations, or feelings of hostility. For, from the answer of the Swedish king and senate, it appears, the blockade was actual, and supported by a force sufficient to effect the measure against the enemy, and, consequently, sufficient against neutral commerce. Coll. Marit. p. 162, 3, 4.

Soon after the breaking out of the war in 1740, a proclamation was issued, introducing a more specific declaration of the shares of flag officers in prizes; but does not appear to have at all altered the Maritime international rules previously in observance.

Towards the close of the first half of the 18th century, several of the most important questions of the Maritime law of nations, underwent considerable discussion, and consequently, elucidation, in the dispute between Great Britain and the king of Prussia, relative to the threatened retention by the latter of the Silesian loan, due to British subjects, in satisfaction of damages alleged to have been sustained by Prussian subjects through the seizure and detention of Prussian vessels and cargoes by British cruisers. The dispute was ultimately settled by the payment of the balance of the loan remaining due, principal and interest, and by the subsequent release of most of the captured vessels. But the argument on both sides was very ably maintained; and as the answer to the Prussian memorial, prepared by Sir George Lee, Sir Dudley Ryder, and William Murray, Esq., afterwards Lord Mansfield, is said to have been termed by the great Montesquieu, *Une reponse sans*

replique, we shall quote that part of it which contains a lucid exposition of the principal doctrines of Maritime international law, as then observed.

“When two powers are at war, they have a right to make prizes of the ships, goods, and effects of each other, upon the high seas. Whatever is the property of the enemy, may be acquired by capture at sea; but the property of a friend cannot be taken, provided he observes his neutrality.

“Hence the law of nations has established, that the goods of an enemy on board the ship of a friend, may be taken.

“That the lawful goods of a friend on board the ship of an enemy, ought to be restored. That contraband goods going to the enemy, though the property of a friend, may be taken as prize; because supplying the enemy with what enables him better to carry on the war, is a departure from neutrality.

“By the Maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be or be not lawful prize.

“Before the ship or goods can be disposed of by the captor, there must be regular judicial proceedings, wherein both parties may be heard, and condemnation thereupon, as prize, in a court of admiralty, judging by the law of nations and treaties.

“The proper and regular court for these condemnations, is the court of that state to whom the captor belongs.

“The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, viz. the papers on board, and the examination on oath of the master and other principal officers; for which purpose, there are officers

of admiralty in all the considerable sea-ports of every Maritime power at war, to examine the captains and other principal officers, of every ship brought in as a prize, upon general and impartial interrogatories: if there do not appear from thence ground to condemn, as enemy's property, or contraband goods going to the enemy, there must be an acquittal, unless, from the aforesaid evidence, the property shall appear so doubtful, that it is reasonable to go into further proof thereof."

"A claim of ship or goods, must be supported by the oath of somebody, at least, as to belief.

"The law of nations requires good faith; therefore every ship must be provided with complete and genuine papers; and the master, at least, should be privy to the truth of the transaction.

"To enforce these rules, if there be false or colourable papers; if any papers be thrown overboard; if the master and officers examined, in *praeparatorio*, grossly prevaricate; if proper ship's papers are not on board; or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy; the law of nations allows, according to the different degrees of misbehaviour or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made, without probable cause, the captor is adjudged to pay costs and damages. For which purpose, all privateers are obliged to give security for their good behaviour; and this is referred to, and expressly stipulated, by many treaties.*

* "Treaty between England and Holland, 17th February, 1668, Art. 13.—Treaty, 1st December, 1647, Art. 10.—Treaty between England and France at St. Germain, 24th February, 1667, Art. 10.—Treaty of commerce at Ryswick, 20th September, 1697, between France and Holland, Art. 30.—Treaty of commerce at Utrecht, 31st March, 1713, between Great Britain and France, Art. 29."

“ Though from the ship's papers, and the preparatory examinations, the property do not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect. If he will not show the property, by sufficient affidavits, to be neutral, it is presumed to belong to the enemy. Where the property appears, from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or according to the circumstances of the case, may be justly entitled to receive his costs.

“ If the sentence of the court of admiralty is thought to be erroneous, there is in every maritime country, a superior court of review, consisting of the most considerable persons, to which the parties who think themselves aggrieved, may appeal; and this superior court judges by the same rule which governs the court of admiralty, viz. the law of nations, and the treaties subsisting with that neutral power, whose subject is a party before them.

“ If no appeal is offered, it is an acknowledgment of the justice of the sentence, by the parties themselves, and conclusive.

“ This manner of trial and adjudication, is supported, alluded to, and enforced by many treaties.*

* “ As appears, with respect to Courts of Admiralty adjudging the prizes taken by those of their own nation, and with respect to the witnesses to be examined in those cases, from the following treaties. Treaty between England and Holland, 17th February, 1668, Arts. 9 and 14.—Treaty, 1st December, 1674, Art. 11.—Treaty, 29th April, 1689, Arts. 12, 15.—Treaty between England and Spain, 23rd May, 1667, Art. 23.—Treaty of commerce at Ryswick, 20th September, 1697, between France and Holland, Arts. 26 and 31.—Treaty between England and France, 3rd November, 1655, Arts. 17 and 18.—Treaty of commerce between England and France at St. Germain's, 29th March, 1632, Arts. 5 and 6.—Treaty at St. Germain's, 24th

"In this method, all captures at sea were tried during the last war, by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, by the courts of admiralty acting according to the law of nations and particular treaties, all captures at sea have, immemorially, been judged of, in every country of Europe. Any other method of trial would be manifestly unjust, absurd and impracticable.

"Though the law of nations be the general rule, yet it may, by mutual agreement between two powers, be varied, or departed from; and where there is an alteration or exception, introduced by particular treaties, that is the law between the parties to the treaty; and the law of nations only governs, so far as it is not derogated from by the treaty.

"Thus, by the law of nations, where two powers are at war, all ships are liable to be stopped, and examined to whom they belong, and whether they are carrying contraband to the enemy. But, particular treaties have enjoined a less degree of search, on the faith of producing solemn passports, and formal evidences of property, duly attested.

February, 1677, Art. 7.—Treaty of commerce between Great Britain and France at Utrecht, 31st March, 1713, Arts. 26 and 30.—Treaty between England and Denmark, 29th November, 1669, Arts. 23 and 34.—Heineccius, who was Privy Councillor to the King of Prussia, and held in the greatest esteem, in his treatise, *de Navibus, ob vecturam vetitarum mercium commissis*, cap. 2. sec. 17 and 18, speaks of this method of trial."

"With respect to appeals or reviews. From treaty between France and Holland, 1st December, 1674, Art. 12,—as it is explained by Art. 2 of the treaty at Westminster, 6th February, 1715-16.—Treaty between England and France at St. Germain, 24th February, 1677, Art. 12.—Treaty of commerce at Ryswick, 20th September, 1697, between France and Holland, Art. 33.—Treaty of commerce at Utrecht, 31st March, 1713, between Great Britain and France, Arts. 31 and 32, and other treaties."

“Particular treaties, too, have inverted the rule of the law of nations; and, by agreement, declared the goods of a friend, on board the ship of an enemy, to be prize; and the goods of an enemy, on board the ship of a friend, to be free; as appears from the treaties already mentioned, and others.*

“So likewise, by particular treaties, some goods reputed contraband, by the law of nations, are declared to be free.

“If a subject of the king of Prussia, is injured by, or has a demand upon, any person here, he ought to apply to your majesty’s courts of justice, which are equally open and indifferent to foreigner or native. So vice versa, if a subject here is wronged, by a person living in the dominions of his Prussian Majesty, he ought to apply for redress in the King of Prussia’s courts of justice.

“If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures, established to try these questions.

“The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in cases of violent injuries, directed or supported by the state, and justice absolutely denied, in re minime dubiâ, by all the tribunals, and afterwards by the prince.†

* Particularly by the aforesaid treaty between England and Holland, December 1st, 1674; and the treaty of Utrecht between Great Britain and France.

† Grotius, *de jure Belli ac Pacis*, lib. 3. cap. 2. sec. 4, 5. Treaty between England and Holland, July 31, 1667, Art. 31. Reprisals shall not be granted till justice has been demanded, according to the ordinary course of law.

Treaty of commerce at Ryswick, September 20, 1697, between France and Holland, Art. 4. Reprisals shall be granted, but on manifest denial of justice.

“Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions, different men think and judge differently, and all a friend can desire is, that justice should be as impartially administered to him, as it is to the subjects of that prince, in whose courts the matter is tried.”

SECTION III.

Of the Maritime conventional law of nations during war, in the course of the first half of the 18th century, from 1701 to 1756.

HAVING thus endeavoured to give a brief exposition of the leading doctrines of the general or common maritime law of nations during war, during the first part of the 18th century, as recorded in the works of the most eminent international jurists of that age; and traced the administration of that law by the principal maritime states, as recorded in the writings of their respective lawyers, and judgments of their respective tribunals, it remains, according to our plan, that we should also endeavour to ascertain, whether any, and what changes or modifications, that general common law underwent during that period, by special treaties between different nations; or what was the particular conventional law of nations, as it has been called, during that period. And here the treaties which accompanied or followed the peace of Utrecht in 1713, are the first and most important.

By the principal treaties of peace then concluded, the territorial arrangements, and the balance of power in

Europe, were understood to be secured in perpetuity: and these were followed by separate treaties of navigation and commerce between Great Britain and France, between France and Holland, and between Great Britain and Spain. In the treaty of navigation and commerce between Great Britain and France, there were a great many minute counter stipulations, and among others the following: § XVII. "And as it is now stipulated concerning ships and goods, that free ships shall also give a freedom to goods; and that every thing shall be deemed to be free and exempt, which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading, or any part thereof, should appertain to the enemies of either of their majesties, contraband goods being always excepted, on the discovery whereof, matters shall be managed according to the sense of the subsequent articles." Chalmers' Treaties, Vol. I. p. 402, 3. By the treaty between Great Britain and Spain in 1713, the somewhat similar stipulations contained in the treaty of 1667, were renewed. What led, in the year 1713, to the insertion or renewal of these special stipulations, does not appear, unless it arose from the great influence which the Dutch then possessed in Britain, and from the consequent success of the efforts which that government had been making for more than half a century preceding, by negotiation, to protect their carrying trade—their commerce de fret—upon which their national prosperity so much depended. Luzac, *La Richesse de la Hollande*, Vol. I. p. 121, 129, &c. But nothing can show more distinctly, that such a rule was not then generally recognized, as the common consuetudinary international law of Europe, than the anxiety exhibited on these occasions, to have a special agreement to that effect inserted in these treaties.

With regard to the legal effect of the stipulation itself, there can be no doubt it constituted the law of nations between Great Britain and France and Spain, as long as the treaties continued in force. But such a stipulation could not bind Denmark or Sweden, or any of the other European powers, who did not then adopt such a special arrangement. And it does not appear, that, when the case occurred, this stipulation was actually observed, either on the part of France and Spain, or on that of Great Britain. On the contrary, it appears, that, in actual practice, it was not observed on the part of France; for while the accurate M. Valin states, Art. VII. of the celebrated ordonnance of 1681, to have been adhered to by the reglement of 1704, but to have been derogated from, or relaxed by the reglement of 1744, agreeably to treaties concluded with certain friendly or neutral powers, he at the same time distinctly states the import of the reglement of 1744, to have been merely, that the neutral vessel should be released with the remainder of her cargo, if neutral, but that the confiscation should still involve the goods of the enemy on board, contrary to the stipulation of "free ship making free goods." And so little did France consider herself bound to observe, as a principle of international law, the stipulated rule of "free ship, free goods," that within three years of the peace of Utrecht, she, in a treaty with the Hanse towns in 1716, exacted the confiscation of hostile goods on board neutral vessels. As little does this stipulation, in the treaty of Utrecht of 1713, appear to have been observed on the part of Spain. For in 1746, the Chevalier D'Abreu stated, that by the law and practice of Spain, the goods of the enemy might be lawfully captured at sea, though on board neutral vessels, with only two exceptions from the general rule; first, when the goods are hypothecated to the captain, or

other neutral; secondly, in virtue of special conventions and particular treaties. Under this second exception, D'Abreu specially mentions the treaties with the French and Dutch, but says nothing of any such effect being given to any treaty with the British.

As it thus appears that the stipulation of "free ship, free goods," inserted in the commercial treaties of Utrecht in 1713, was not observed or acted upon, either by France or Spain, it could not be reasonably expected that Great Britain should do so. The fact seems to have been, that this stipulation, apparently inserted through the influence of the Dutch, was neglected, or rather, by tacit acquiescence, was voluntarily departed from by each of the contracting parties. And accordingly, it appears to have been deemed necessary, in the treaty of peace of Aix la Chapelle in 1748, to renew or revive the treaty of Utrecht with several others prior and subsequent.

The only other treaties, during the period we are now surveying, which contain any similar stipulation, seem to be, the treaty of navigation and commerce between Philip V. King of Spain, and Charles VI. Emperor of Germany, at Vienna in 1725, and the treaty of commerce between France and Spain in 1742, and between France and the King of the two Sicilies in 1745. But it is incorrect, if not absurd, to talk of these treaties between separate powers, confirming a previously established, or establishing a general rule, or any rule, beyond the stipulations of the particular treaty, to the extent of these mutual stipulations, and for the period of its endurance.

There is no evidence of the practical existence, or actual observance of such a previous juridical rule, which could be confirmed by treaty. And all that is proved or established by the repetition of the same or

similar stipulations, in successive treaties among different nations, is the usage or practice of making such stipulations. But upon such usage of contracting, which clearly implies a conviction of the absence of obligation otherwise, and of the necessity of a compact, it is impossible, consistently with legal principle, or sound logical inference or induction, to found, or rear up, a general contract, binding upon all and sundry, who may have ever entered into such a special contract, with any other, one, or more, individual nations. And at the end of the first half of the last century, the conventional law of Europe, as it is called, as distinguished from the common consuetudinary law of nations, founded on the principles of the natural law of nations, stood precisely on the same footing as at the close of the 17th century. The several treaties concluded during the first half of the 18th century, were, of course, binding on the contracting parties, so far as they remained in force, and were not annulled by subsequent failure to perform, or by subsequent hostilities, without a renewal. These treaties, of course, so far superseded and modified the common law of nations, between the contracting parties, and formed, in proportion to their number and force, a very important part of the law of nations, which the German jurists, Moser and Martens, have had so much merit in collecting and scientifically arranging.

CHAPTER VIII.

OF MARITIME INTERNATIONAL LAW, CHIEFLY DURING WAR,
IN THE COURSE OF THE EIGHTEENTH CENTURY,
FROM 1756 TO 1776.

HAVING thus endeavoured to give a brief exposition of the leading doctrines of Maritime international law in Europe, during the first half of the 18th century, from the war terminated by the peace of Utrecht, to the war commenced in 1756, by analysing the works of the principal international jurists of that period, and tracing the administration of that law by the principal Maritime states, as recorded in the writings of their respective lawyers, or in the reports of the judgments of their respective tribunals, we proceed, as formerly proposed, to the next portion of the 18th century, extending from the commencement of the war in 1756, to the war which commenced in 1776. And here, as formerly, our review will embrace the writings of the principal international jurists; the practical administration of this department of law, as appearing from the statutes, ordinances, edicts, proclamations, and judicial determinations of the different Maritime states; and also the treaties or conventions entered into by these different states, as modifying with regard to the contracting parties, and as attempting

to modify still more extensively, the common consuetudinary previously recognized law of nations.

At the commencement of the period we are now to contemplate, from 1756 to 1776, Archdeacon Rutherford terminated the course of lectures which he had for some years delivered in St. John's College, in the University of Cambridge, by publishing in 1756, the substance of these lectures, under the title of *Institutes of Natural Law*. In the second volume, he expounds the rights and obligations of mankind, as members of civil societies. In the ninth chapter of that volume, he treats of the law of nations. And a few extracts from that chapter will exhibit a fair view of the opinions then entertained by the intelligent and educated classes of the population of England, with regard to the leading points in Maritime international law, which came to be so much disputed during the subsequent portion of last century.

RUTHERFORTH.

§ XIX. "When two or more nations are at war with one another, the principal questions relating to neutral states, that is, to such states as are not parties in the war, are, first, what these neutral states may do in respect of either of the nations which are at war, without departing from their neutrality; and, secondly, what conduct is allowable in the nations which are at war, towards the neutral states.

"The general rule in the first of these questions is, that a neutral state is not at liberty to give any assistance to either of the states at war, consistently with its neutrality. But if we distinguish the notion of neutrality into general and particular, the rule in a particular neutrality will require a different construction. The neutrality of a nation is general, where it is not in fact a party in

a war. It is particular where the nation has bound itself by compact to one or both the contending nations, not to make itself a party. If the neutrality is only general, it is only inconsistent with such neutrality to give assistance to either of the contending nations, that is, the state by giving its assistance to either of them, ceases to be a neutral state; and may be treated by the other of them, as a party in the war. If the neutrality is particular, and a compact of neutrality has been made with both, it will then be a breach of compact, and, consequently, an injury against one of them to give assistance to the other. Or, if the compact is made with only one of them, the giving of such assistance to the other, will be a breach of this compact; but to assist the nation with which the compact is made, will only be a simple breach of neutrality in respect of the other.

“The neutrality of a state abridges its liberty of trading with either of the contending nations, but does not wholly destroy this liberty. Nothing is inconsistent with the notion of its neutrality, besides assisting one of them in the war. It may therefore supply either of them with all goods, as if they were at peace with one another, except such goods as will help the party that is supplied with them, to carry on the war more effectually. Goods of this sort are called contraband of war,” &c. * * * “When a war is carried on by sea, as well as by land, not only ships of war, which are already built, but the materials for building or repairing of ships, will come under the notion of warlike stores. It may be said, indeed, that timber or cordage may be used for other purposes, besides the building or fitting out of ships, or for the building and fitting out of ships, which are not ships of war. But this will be of no great weight, for the same might be said of horses or saddles, or many other things, which are commonly

reckoned among warlike stores: they are capable of being employed for other purposes; the uses of them are not necessarily confined to the purposes of war. But as arms and ammunition are warlike stores in their own nature, so timber or cordage, as well as horses or saddles may, in all reason, be reckoned warlike stores; when from comparing the sorts or quantities of them with the condition and circumstances of the war, it appears, if not to be impossible, yet, at least, to be in the highest degree unlikely, that they should be designed for any other purpose, besides the purposes of war. Even common provisions for the support of life, will come under the notion of warlike stores, when they are going to a place, which is besieged or blockaded. They are not, indeed, such weapons as will annoy an enemy in war; but they are such stores as will help the nation to which they are carried, to make its defence in war more effectually than it could have done without them, when one of its towns or ports is besieged or blockaded.

“Sometimes to remove all possibility of doubt about what goods are contraband, a nation that is at war enumerates them particularly, in treaties or compacts with neutral states; and such treaties leave the neutral states with which they are made, at liberty to supply the enemy with all goods that are not enumerated in them. But these treaties do not operate as a law, and determine what shall, and what shall not, be reckoned contraband, amongst all nations whatsoever; they are, in this respect, like all other treaties, and are binding only on the nations that are parties to them.

“When contraband goods are carried to our enemy by a neutral state, which either did know, or might have known, that the assistance which it thus gives to our enemy, will hinder the execution of our right, as this neutral state does us damage, it is obliged, in the opinion

of Grotius, to make us amends: and if such amends is refused, we may justly make reprisals upon it to the amount of the damage. But here he supposes the contraband goods to have been delivered, and some actual damage to have been done. For, if the neutral state has not done any actual damage, but only designed to do it, he does not allow us a right of reprisal, or even a right to take the contraband goods to our own use, unless we take them upon the claim of necessity; that is, unless the exigency of affairs is such, that we cannot possibly do without them. All that he allows us to do, when we are not pressed by such a necessity as this, is to compel the neutral state to give us security, by hostages or pledges, or some other means, that it will not attempt any thing of the like sort for the future. If, indeed, the neutral state not only does a simple injury, but appears plainly to have had a malicious design of hurting us, by confirming and assisting our enemy in an unjust war against us, this, says Grotius, is a criminal act; and, as we may punish it for such an act, in some other way, so likewise we may punish it by deprivation of goods, and particularly by seizing the contraband goods, which it was carrying to the enemy. But there is a reason which our author does not take notice of, why we may, consistently with the law of nations, seize upon the contraband goods of a neutral state, which it is carrying to the enemy, as if they were the goods of an enemy, without considering this act as a crime for which we may punish those who are guilty of it, by depriving them of their goods. If we meet with the contraband goods on their passage, and prevent the delivery of them to the enemy, there is certainly no actual damage done to us by the neutral state from which they came, there is only a design of doing us damage. And this design, if it is considered separately

from its circumstances, will give us only a right of guarding against it, or perhaps of taking some security against any future attempt of the same sort. But the first instance of such an attempt is a breach of neutrality. A neutral state, by sending contraband goods to our enemy, whether it delivers them or not, makes itself, so far at least, an accessory to the war; as it would have given assistance to the enemy, if we had not prevented it. We cannot, indeed, treat it as a principal in the war, where it does not assist the enemy with its whole force. But so far as it is an accessory to the war, we may treat it as an enemy, and, consequently, may seize the contraband goods as if they had belonged to an enemy. The injury which the neutral state attempts, as it is not completed, produces no claim to reparation of damages: but the attempt itself makes the neutral state an accessory to the injuries which we have received from the enemy; and thus the neutral state, by communicating in the injustice of the enemy, gives us a right to demand reparation of damages, as far as it has communicated in this injustice. We have a right in war to take the goods of the enemy. But this right is restrained to such goods as are either in our own territory, or in the territory of the enemy, or in places which are not parts of the territory of any state. For, if the goods of an enemy are in the territory of a neutral state, since we have no right to go thither in a hostile manner, they are under the protection of that state, and the law of nations will not allow us to take them. In like manner; we have no right to take them, if they are on board a ship, whilst the ship is in a neutral port, whether the ship itself is a neutral one, or belongs to the enemy; because the port is a part of the territory of the neutral state. When the goods of an enemy are on board the ship of an enemy, and the ship is in the main ocean, there can be no doubt

about our right of taking both the goods and the ship; because they are then in a place which is not in the territory of any nation. But when the goods of an enemy are on board a neutral ship, and the ship is in the main ocean; though we have a right to take the goods, we have no right to take the ship, or to detain it any longer than is necessary to obtain possession of the goods. For the ocean itself is no territory; and neutral ships, as they are moveable goods, are not part of the neutral territory. As long as the ships continue in their own ports, the goods which are on board them, as well as the ships themselves, are within the neutral territory, and cannot be taken. But as soon as the ships come into the main ocean, the goods which are on board them are in no territory, and, consequently, are no more under the protection of the neutral state, than the same goods would be if they were passing through an uninhabited country, where no nation has jurisdiction, in neutral carriages, or on neutral horses. A neutral ship may indeed be called a neutral place, but when we call it so, the word—place—does not mean territory; it only means the thing in which the goods are contained; and as this is a moveable thing, it is no part of the territory, and is no longer under the jurisdiction of the nation, than it continues within the territory. Though the goods of the enemy had been on board a ship belonging to the enemy, we might have said in the same sense, that they were in a neutral place, if they had been locked up there in a neutral chest. But no one would imagine, that such a neutral place as a chest, can be considered as a part of the territory of the neutral state, or that it could protect the goods, notwithstanding a neutral chest is as much a neutral place as a neutral ship. The jurisdiction of a nation over things, is confined to that tract of land upon which

it is settled, and to such waters as are appendages to that land. Those immoveable things, which are called the territory of a nation, are the immediate objects of jurisdiction, a paramount property. Moveable things are the proper objects of inferior property or private ownership, and are no otherwise the objects of jurisdiction, than as they happen to be within the territory. Thus, a ship, though it is a moveable thing, is under the jurisdiction of a nation, whilst it continues in one of its ports. But as soon as it is out at sea, only the private ownership or inferior property of the ship continues, it ceases to be under the nation's jurisdiction. The case will be the same, if, instead of supposing the ship to be the property of a private merchant, we suppose it to be the property of the nation. For though we cannot well call the property which the nation has in such a ship, by the name of private ownership, yet, when the ship comes into the main ocean, the jurisdiction or paramount property of the nation ceases; and the right that remains, is an inferior kind of property, which has the nature of private ownership. But if the jurisdiction which a neutral state has over the ships of its members, or even over its own ships, ceases when the ships are out at sea, the goods of an enemy that are on board such ships, cannot be under the protection of the nation, in the same manner, as if the ships had been in one of its ports, or as if the goods had been on its land."

"Notwithstanding, a ship, when it is on the main ocean, is no part of the territory of a nation, and, consequently, is not subject to the jurisdiction which the nation has over things; yet the men who are in it, as they are members of the nation, are still subject to the jurisdiction which it has immediately over the persons of its members. When the seamen are on land, or in port,

the nation has an immediate jurisdiction over them, as they are members of it, and a mediate jurisdiction over them, as they are persons within its territory. But when they are out at sea, though in one of its own ships, only the former sort of jurisdiction remains, and the latter sort ceases.

“In some nations, causes which arise at sea, and have no connection with the land, whether they are civil or criminal, are cognizable by particular courts of marine or admiralty, which do not make use of the same forms that are used in other courts of the same nation, and do not proceed upon what is called the law of the land, or of the territory. It is plain, that in the opinion of any nation, where such courts are established, a ship, when it is out at sea, is no part of its territory: for if it was, though there might be a distinction of courts, there could be no reason why the courts which have cognizance of such causes as arise at sea, should decide according to any other law, than what is the general law of the land in all causes, which are in every respect the same, except only that they arise on the land, or are connected with it.

“Though a neutral nation, when its ship is in the main ocean, has no such jurisdiction over the ship itself, as if it was a part of its territory, yet, either the nation itself, or some of the members of the nation, which is the same thing in the view of the law of nations, will continue to have an inferior sort of property or ownership in it. And this inferior property or ownership, will render it unjust in us to take the ship, notwithstanding we may lawfully take any goods of the enemy which are on board.

“But here a difficulty offers itself, which must not be overlooked. That inferior kind of property which we have called private ownership, to distinguish it from a

jurisdiction over things, is an exclusive right; those persons who have such ownership in things, whether they are private or public persons, have a right to exclude all other persons from making use of these things. Wild beasts, birds and fishes, are, till they are caught, in common to all mankind; and I have a right with the rest of mankind, to catch them, and to make them my own by catching them. But I cannot hunt, or shoot, or fish, without using the soil or the water of another man. And as I have no right to use these without his consent, he may justly hinder me from doing any of these acts, as far as his right of property extends. Thus, therefore, by his private ownership, I am hindered from taking such things as I should otherwise have a right to take, if they did not happen to be in such places as he has an exclusive right to. In like manner, though we have a general right to take the goods of an enemy, when they are out at sea, yet there is some reason to doubt, whether the effect of this right may not be hindered by the inferior property or ownership, which a neutral nation has in the ship where the goods are. For it may be said, that notwithstanding our general right to take the goods, the neutral nation, considered merely as a private owner, has an exclusive right to its own ship; and, consequently, may hinder us from coming into the ship to take the goods. Those who set up a purely positive law of nations, have nothing else to do here, in answer to this difficulty, but to prove the existence of such a law, and to show that this law has determined otherwise. But if the law of nations is nothing else, but the law of nature applied to the collective persons of civil societies; instead of answering that the law of nations has determined otherwise, we must find out a natural reason, why it should determine otherwise. Where I have merely a right to acquire

property in a thing which is in common to all mankind, but cannot acquire property in it without the use of what is already the property of some other man, this man neither does me an injury, nor encourages or protects others who have injured me, by excluding me from the use of what belongs to him. And thus my right of acquiring things which are in common, will, by his means, fail of producing its effect; whilst he, by whose means it so fails, will be chargeable with no crime, or no fault; because he has done nothing more than his property in what I wanted to use, will justify him in doing. But where we have a right in war, upon account of the damage which the enemy has done us, to take the goods of the enemy, and these goods are in a neutral ship; if the neutral state, though it has property in the ship, should make use of its right of property to protect the goods against us; this protection makes it an accessory to the injury, which gave us a claim upon the enemy to obtain reparation of damages, and, consequently, is inconsistent with the notion of neutrality. But whilst this answer removes one difficulty, it brings on another. If a neutral nation makes itself an accessory to the damages that the enemy has done, by protecting such goods of the enemy, as we have a right to take for reparation, when these goods are out at sea in one of its ships; why might the same nation, without making itself an accessory to those damages, protect the same goods, when the ship is in one of its ports, or when the goods are on land, within its territory? A law of nations, which is natural as to the matter of it, and positive only as to the objects of it, will furnish us with an answer to this question.

“Every state has, by the law of nations, an exclusive jurisdiction over its own territory. As long, therefore, as a state keeps within its own territory, and exercises

its jurisdiction there, we have, by this law, no right to take notice of what it does; unless, indeed, where by protecting some person who has committed a crime in our territory, it infringes upon our jurisdiction. But when its ships are in the main ocean, as they are then in a place out of its territory, where by the law of nations, it has no jurisdiction, this law will allow us to take notice of the protection which it gives to the goods of the enemy, and to consider it as an accessory to the damages done by the enemy, if it gives them protection.

"The goods belonging to a neutral state, or to any of its members, cannot be lawfully taken, when they are on board the ship of an enemy. The neutral state has, indeed, no jurisdiction in the ocean where the ship is; but it has property in the goods; and as the law of nature will not allow us, so there is no purely positive law of nations that will warrant us, to violate the right of property. In the mean time, the neutral goods will not secure the ship itself. For the ship is neither the property of the neutral state, nor within its jurisdiction.

"Since the members of a nation which is engaged in a war, whether they act under particular commissions, or under the general commission of public war, may take the goods of the enemy, but cannot lawfully take any goods or ships which are the property of a neutral state, unless the goods are contraband, who shall be the judge in these two questions, that is, who shall determine whether the goods or ships which the members of such a nation have seized upon, and gotten into their possession, are the property of the neutral state; and, if they are its property, who shall determine whether they are contraband? Other neutral states which have no interest in the goods or ships, might be unprejudiced judges; but the law of nations has not made them authentic (authoritative) judges. All nations are, in

respect of one another, in a state of nature, or of equality; no one nation has jurisdiction over the rest; and no number of nations has jurisdiction over any one. The same reason which excludes all other nations from having jurisdiction in these questions, will exclude both the neutral nation, whose members claim property in the goods or the ships, and likewise the nation whose members have them in their possession, and claim them by the right of war. These two nations are, in respect of one another, in a state of equality; and neither of them has any authority over the other. The jurisdiction which the neutral nation has over things, will not extend to the things in question, because they are not within its own territory. And its jurisdiction over the persons of its own members, will here give it no judicial authority; because in these questions its own members are the parties only on one side; the members of the other nation are the parties on the other side; and the neutral state has no jurisdiction over their persons. In respect of these reasons which exclude the jurisdiction of the neutral state, there is no material difference between that, and the other, to which the captors belong. The things in question will, indeed, be within the territory of the latter, if the captors have brought the ships into their own ports. But the controversy arose upon the main ocean, which is out of its territory; and as it had no jurisdiction in the first instance, the subsequent act of bringing the things into its territory, will not give it jurisdiction. If any subsequent act can give it jurisdiction, it must be a subsequent consent of the parties. The foreigners who claim the goods or ships, may agree with the captors to have their respective claims decided by the state to which the latter belong. And such an agreement will bind them to submit to the sentence of the state. But if the things were brought

by force into the ports of the state to which the captors belong, this act of force can produce no effects of right; till it appears whether the force is lawful or not, that is, till it appear, whether the goods might lawfully be taken or not; and, consequently, this act can produce no jurisdiction in the state, to determine whether they might lawfully be taken. The state cannot have jurisdiction by means of this force, till the question in which the jurisdiction that we are inquiring after, is wanted, has been determined.

“In the usual practice of nations, the state to which the captors belong, decides, whether ships or goods, which are seized upon in war, are the property of a neutral state or of an enemy, and whether the goods, if they are the property of a neutral state, are contraband, or not. But since the law of nature does not give it any authority in these questions, which can properly be called jurisdiction; it will be necessary, if there is no purely positive law of nations, that has given it such jurisdiction, to inquire, upon what natural reasons its right to decide about them is founded, and what sort of right this is. The state to which the captors belong, has a right to inspect into their behaviour, both because they are members of it, and because it is answerable to all other states for what they do in war: since what they do in war, is done either under its general, or under its special commission. The captors, therefore, are obliged, upon account of the jurisdiction which the state has over their persons, to bring such ships or goods, as they seize on the main ocean, into their own ports; and they cannot acquire property in them, till the state has determined, whether they were lawfully taken or not. This right, which their own state has to determine this matter, is so far an exclusive one, that no other state can claim to judge of their be-

haviour, till it has been thoroughly examined into by their own, both because no other state has jurisdiction over their persons, and likewise, because no other state is answerable for what they do. But the state to which the captors belong, whilst it is thus examining into the behaviour of its own members, and deciding whether the ships or goods, which they have seized upon, are lawfully taken or not, is determining a controversy between its own members, and the foreigners who claim the ships or the goods; and this controversy did not arise within its own territory, but on the main ocean. The right, therefore, which it exercises, is not civil jurisdiction; and the civil law which is peculiar to its own territory, is not the law by which it ought to proceed. Neither the place where the controversy arose, nor the parties who are concerned in it, are subject to this law. The only law by which this controversy can be determined, is the law of nature, applied to the collective bodies of civil societies, that is, the law of nations. Unless, indeed, there have been any particular treaties made between the two states, to which the captors and the other claimants belong. They may have mutually bound themselves by particular treaties, to depart from such rights, as the law of nations would otherwise have supported: goods, which would naturally have been contraband, may, by express treaty, be made free; and on the other hand, goods, which would naturally have been free, may be made contraband; neutral goods, which are on board the ship of an enemy, may, by express treaty, be made lawful prize, though by the law of nature they would have been free; and the goods of an enemy on board a neutral ship, may be made free, though by the law of nature they would have been lawful prize. When such treaties have been made, they are a law to the two states, as far as they extend, and to

all the members of them in their intercourse with one another. The state, therefore, to which the captors belong, in determining what might, or might not be lawfully taken, is to judge by these particular treaties, and by the law of nations, taken together.

“The right of the state, to which the captors belong, to judge exclusively, is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence; though the sentence should happen to be erroneous; because it has a complete jurisdiction over their persons. But the other parties in the controversy, as they are members of another state, are only bound to submit to its sentence, as far as this sentence is agreeable to the law of nations, or to particular treaties; because it has no jurisdiction over them, in respect either of their persons, or of the things that are the subject of the controversy. If justice, therefore, is not done them, they may apply to their own state for a remedy; which may, consistently with the law of nations, give them a remedy, either by solemn war, or by reprisals. In order to determine when their right to apply to their own state begins, we must enquire when the exclusive right of the other state to judge in this controversy ends. As this exclusive right is nothing else, but the right of the state to which the captors belong, to examine into the conduct of its own members, before it becomes answerable for what they have done, such exclusive right cannot end, till their conduct has been thoroughly examined: natural equity will not allow that the state should be answerable for their acts, till those acts are examined by all the ways, which the state has appointed for this purpose. Since, therefore, it is usual in maritime countries, to establish not only inferior courts of Marine to judge what is, and what is not lawful prize, but likewise superior courts of

review, to which the parties may appeal, if they think themselves aggrieved by the inferior courts; the subjects of a neutral state can have no right to apply to their own state, for a remedy against an erroneous sentence of an inferior court, till they have appealed to the superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the state, to which the captors belong, to examine into their conduct; and till their conduct has been examined by all these means, the states' exclusive right of judgment continues. After the sentence of the inferior courts has been thus confirmed, the foreign claimants may apply to their own state for a remedy, if they think themselves aggrieved; but the law of nations will not entitle them to a remedy, unless they have been actually aggrieved. And even, if upon their own report, they appear in the judgment of their own state to have been actually aggrieved, yet this will not justify it in declaring war, or in making reprisals immediately. When the matter is carried thus far, the two states become the parties in the controversy. And since the law of nature, whether it is applied to individuals or to civil societies, abhors the use of force, till force becomes necessary, the supreme governors of the neutral state, before they proceed to solemn war, or to reprisals, ought to apply to the supreme governors of the other state, both to satisfy themselves that they have been rightly informed, and likewise to try whether the controversy cannot be adjusted by more gentle methods."

HÜBNER.

About the commencement of the period we are now surveying, namely, in 1759, M. Hübner, Jurisconsult, and Assessor in the Consistorial Court of his Danish Majesty

at Copenhagen, published and dedicated to the Baron de Bernstorff, his able treatise "*De la Saisie des Batimens neutre.*" In this treatise, Hübner did not, as has been frequently supposed, introduce for the complete protection of neutral trade, doctrines altogether new. These doctrines, as we have seen, had been contended for by the Hanse towns in the 15th and 16th centuries, as valid in their favour, when neutral, but not valid against themselves, when at war. And they had, as we have also seen, been brought forward sixty years before Hübner wrote, in an elaborate Latin treatise by Groningius in 1697, in favour of the Danes and Swedes, then neutral, and in favour of Louis XIV. when at war with England and Holland. But Hübner was an abler man than Groningius, and the more effectually to support the cause of his clients, he conceived the bold plan of showing, that some of the chief rules of legal right and obligation between belligerents and neutrals, which had been recognized and adopted in practice, for four or five centuries preceding, with occasional deviations in favour of, or against particular nations, by special treaties between them, were so many deviations from the true law of nations; and that the occasional stipulations, which different nations had made, by special treaties with each other, were not deviations from that law, but that law itself. In prosecution of this bold scheme, he set out with an attempt to vilify and undermine the authority of the *Consolato del Mare*. But his object in doing so, was easily seen through; and he failed in the attempt; as appears from the following passages from Valin, Emerigon, and Pardessus. "M. Hübner, &c. &c. entreprend de prouver fort serieusement, que le pavillon neutre couvre toute la cargaison, quoique elle appartienne à l'ennemi, ou qu'elle soit chargée, pour son compte, de manière qu'il n'en ex-

cepte, que les effets de contrebande. Mais cet Auteur est absolument décidé pour les neutres, et semble n' avoir écrit, que pour plaider leur cause. Il pose d'abord, les principes, qu' il donne pour constants; puis il en tire les consequences, qui lui conviennent. Cette methode est fort commode. Valin, *Traité des Prises*. Chap. V. Sect. V. No. 5. M. Hübner. * * * parle du Consulat de la Mer, d' une maniere, des plus defavorables. * * * Cet Auteur ayant trouvé dans le Chapitre 274, (273, or 275), des decisions contraires, à son système, a été de mauvais humeur, contre l' ouvrage entier; mais s' il l' eut examiné, avec quelque soin, il se seroit convaincu, que les decisions, que le Consulat renferme, sont fondées sur le Droit des Gens. Voila pourquoi, elles reunirent les suffrages des nations; elles ont fourni une ample matiere, aux redacteurs de l' ordonnance de 1681; et malgré l' ecorce Gothique, qui les enveloppe quelquefois, on y admire l' esprit de justice et d' equité, qui les a dictées. Emerigon, *Traité des Assurances*, Tom. I. Preface, P. 7, 8. Hübner, says M. Pardessus, est le seul, à ma connoissance, qui ait parlé avec dedain de cet ouvrage. Emerigon, dans sa preface, a tres bien indiqué la cause de l' humeur, et de l' injustice de cet ecivain. Sans doute le Consulat est une compilation faite sans gout, et sans ordre; mais il est impossible de méconnoître la sagesse de presque toutes ses dispositions, qui sont devenues la base de Lois Maritimes actuelles de l' Europe. Collect. de Lois Marit. Tom. II. Chap. XII."

But although Hübner is thus held by the highest continental authorities, to have been too fond of system, and unjust in his criticism of such works as recorded facts inconsistent with his theory, and to have exhibited the talents rather of an advocate for a party, than the sound discretion of a judge, his work shows great acute-

ness and power of reasoning, as well as learning; had considerable influence at the time it appeared; and in these historical researches deserves a pretty full notice. In the meantime, however, we shall merely give a short analysis of his work, so far as it illustrates the previously recognized doctrines of Maritime international law, and reserve the examination of the other doctrines he endeavours to establish, till we come to notice the very able and impartial treatise of Lampredi, which appeared during the next short period we are to contemplate.

In the first and second chapters of the first part of his first volume, after a little too much parade, perhaps, of general maxims, ethical and legal, and definitions, somewhat in the style of mathematical axioms and definitions, Hübner proceeds to enumerate with considerable precision, the rights of war in relation to neutral nations; the limits of these rights; and the rights and duties of neutral states. In chapters third and fourth, he treats of the liberty of commerce in general, and of maritime commerce in particular, in time of war. In chapters fifth and sixth, he discusses the origin and foundation of the right of belligerent nations to seize neutral vessels, and the boundaries of this right of seizure, according to what he holds to be the universal law of nations. In chapter seventh, he details the cases in which neutral vessels are liable to seizure, according to what he holds to be the principles of that universal code: first, when they voluntarily assist the enemy in his naval expeditions or warlike operations; second, when a ship of war is built in a neutral port, on account, or for the service of a nation which is at war; third, when a neutral vessel serves as a spy to one of the belligerent parties; fourth, when neutral vessels carry warlike stores, or even provisions, if to a besieged or blockaded port; fifth, when neutral vessels slip into a blockaded port, which approach

the coast, to forward to such a port, letters or packets, or in short, maintain any communication with such a port, without having previously obtained permission; sixth, when neutral vessels convey to belligerent parties, troops, arms, or any other things, which are manifestly subservient to war, of which, consequently, the use which the enemy would make of them, is not doubtful, and which have, therefore, been denominated contraband of war; seventh, when neutral vessels have not the regular and ordinary ship's papers on board; when they want the usual and reasonable proofs of their neutrality.

In chapter eighth, on the other hand, Hübner enumerates the cases in which neutral vessels are not liable to seizure, according to what he holds to be the law common to all nations: first, neutral vessels which do nothing more than carry on the ordinary commerce of their nation; second, when neutral vessels abstain from carrying to blockaded ports, any warlike stores or provisions, and from maintaining with such ports, any communication, not permitted by the blockading force; third, when neutral vessels, in navigating, innocently in relation to war, for one of the belligerent parties, do not refuse to do as much for the other in similar cases—(In discussing this alleged exemption from seizure, Hübner is obviously aware of the difficulty and doubt which attend his argument);—fourth, when the cargoes of neutral vessels, although destined for some port in the dominions of the belligerent nations, are not composed in whole, or in part, of instruments or merchandise, for obvious use in war; fifth, when neutral vessels are merely found in a port, at the time when that port is carried or occupied by the adverse belligerent; sixth, neutral vessels, recognized as such, are not liable to seizure in the open seas, whatever may be their cargo

or their destination—(Hübner labours hard to establish this exemption; but in our opinion, unsuccessfully, as we shall see, when we come to consider the work of Lampredi. Indeed, he himself makes exceptions, as when they have not sufficient evidence of their neutrality, or when vessels of war are built in a neutral port, on account, or for the service of the belligerent, or afford assistance to blockaded ports; and concludes with the observation, that if a neutral state suffers one of the belligerents to seize its vessels on the open seas, that state is bound to give a similar permission to the other party);—seventh, no proof is necessary to show that neutral vessels, when in their own ports, are not liable to seizure; eighth, they are not liable to seizure, before a declaration of war.

In the first chapter of the second part of the first volume of his work, Hübner enters into details with regard to articles contraband of war, determined according to what he holds to be the principles of the universal law of nations. After Grotius, he divides the cargoes of neutral vessels into three classes, or descriptions of articles. First class; things which serve only for war, or which are mainly of use in it; which have a direct and immediate relation to its operations; and of which, consequently, the use which the belligerents would make of them, does not admit of doubt; such as arms and warlike stores of all kinds. Second class; things which serve equally in time of peace, as in time of war, which are not properly and solely of use in war, which do not relate in any direct and immediate manner to its operations; and of which, consequently, the use which the belligerents might make of them, if carried to them, is not decided; such as money, bullion, grain, provisions. Third class; things which, properly speaking, are of use solely in time of peace, which are not necessary for

making war, or relative to its operations, and which, consequently, a belligerent nation may easily want; without the privation weakening her defence, or enfeebling her military enterprizes, such as goods of luxury or fashion, ornaments of houses, books, pictures, &c.

In stating the reasons for making this classification, Hübner remarks, that the goods of the first class are always liable to seizure at suitable times, and in suitable places; although they may not be always liable to confiscation; that those of the second class are liable to seizure only in certain cases, and are rarely subject to confiscation; and that those of the third class are not liable to seizure, or to adjudication as lawful prize. And he proceeds to specify the different articles of the two first classes, which are more or less contraband of war, according to what he states to be the two great laws of neutrality, as follows: I. Neutral nations must remain totally inactive with reference to war and its operations. II. They are bound to observe exact impartiality, in all the remainder of their conduct towards the belligerent nations.

Now, so far as they go, these two laws of neutrality laid down by Hübner, appear to be correct. But they do not appear to exhaust the subject; or to provide for all the cases which had occurred, even when he wrote. The measure of the rights of neutral nations during war, seems to be very much the state of their commerce during the preceding peace. They may be entitled to insist on the preservation of the status quo, ante bellum. They may, perhaps, legitimately insist, they shall not be put in a worse situation, through the quarrels of their neighbours. But their rights, like those of individuals living in civil society, may be so far limited, by the concourse and collision of the rights of their neigh-

bours, in maintaining their own self-defence, and in prosecuting and vindicating their more essential attributes, when invaded. And they are not entitled to make their situation better, through the unfortunate quarrels of their neighbours, or to take advantage of, and reap profit from, these quarrels. Among nations, as well as among individuals, *nemo debet locuplitari alienâ jacturâ*.

In chapter second of the second part of his first volume, Hübner enquires, "whether the flag covers the cargo;" according to what he calls, "*les arrets de la legislation universelle*;" and labours very ingeniously to establish the affirmative. But of this argument we may delay the consideration, till we come to notice the opposite view and argument of Lampredi, during the period we are next to contemplate. And we shall here merely again refer to the remark of Valin in 1763, on this doctrine. "*Cet auteur est absolument décidé pour les neutres; et semble n'avoir écrit, que pour plaider leur cause. * * * On commencera par lui demander, sur quoi il établit, que les marchandises de l'ennemi sont exemptes de confiscation dans un bâtiment neutre?*" *Traité des Prises*, p. 63.

In the third chapter of the second part of his first volume, concerning the visitation and search of neutral vessels, Hübner sets out with admitting it is incontestable in general, that belligerent powers have a right to cause to be visited and searched, in suitable times and places, vessels belonging to the subjects of neutral states. And in proof of this right, he points out the necessity of the measure for distinguishing neutrals from enemies, in order to prevent the frauds committed by the assumption of the flag of other nations, and in order to deprive belligerents of the right which they would otherwise have, of treating neutrals on the footing of

enemies. He next gives a definition of the visitation of neutral vessels, as the act of a ship of war, or of a privateer furnished with letters of marque, or the commission of a belligerent state, by which they ascertain the actual and real neutrality of a vessel, which hoists a neutral flag, in order to be able to exempt it from the severe treatment or hostilities which they are entitled, or even bound to adopt, against the vessels of their enemies; and he proceeds to mark the limits of this right, and the mode in which it ought to be exercised, viz. that belligerents must prove the state of war; that privateers must show their commissions from their respective sovereigns; that the right does not embrace ships of war, if neutral; that the visitation and search ought not to extend beyond what is necessary for ascertaining the actual neutrality of the vessel, hoisting that flag; that this may be done by the mere inspection of the papers, which are to be found on board such vessels, and in the case of strong grounds for a suspicion of their falsehood, by a slight glance at the vessel and her crew; and belligerents have no right to push farther their researches in that respect. The author next gives a list of the documents which ought to be found, and which are usually, in part, found on board neutral vessels; and maintains that neutral powers are by no means obliged, in order to show the regularity, innocence, and impartiality of the conduct of such vessels, to suffer belligerents to cause them to be visited on that footing. The right of visitation does not authorize the belligerent to break open, by an axe, or otherwise, the trunks, chests, or boxes, which are found on board those vessels, to displace to the bottom of the ship's hold, the bales of goods which compose the cargo, to open each, and put the goods in disorder, or to perform similar impertinent and insolent acts. The author then reverts to what he

had stated as the end or object of the visitation of neutral vessels, namely, to put it in the power of ships of war and privateers, to exempt these vessels from the severe measures or hostilities which they are entitled, and even bound to adopt, against the vessels of their enemies; and marks the boundaries of the exercise of that right, in point of place and time; namely, in point of place, as limited to the ports or harbours, bays, or seas, immediately adjacent to the coasts which are understood to be under the dominion of the adverse belligerent; to those ports and others which are their own dependencies; and finally, to those places, of which the sovereignty or jurisdiction belongs to no one, namely, the oceans and the open sea: in point of time, from the declaration or authentic notification of the war, to the signature of the treaty, or sufficient publication of the peace. The author concludes this chapter, by inquiring whether it belongs to the captain or master of the neutral merchant vessel, to repair on board the ship of war, and there produce his ship's papers and documents; or whether it is not rather incumbent on the commander of the latter, to repair, or send some one on board the neutral vessel, to take cognizance of its state, and cause to be exhibited the proofs of its neutrality. And he decides in favour of the latter alternative.

From this short notice, it is manifest, Hübner's observations on the origin and foundation of the right of visitation and search, are acute and ingenious. The right is, confessedly, from its nature, very liable to be abused. And Hübner is quite justified in maintaining that effectual precautionary measures ought to be adopted, to prevent such abuse in practice. On the other hand, by carrying such restrictions too far, there is manifestly very great danger of the concerted frauds of enemies and neutrals, being allowed to pass undetected, of the one belligerent

receiving such undue clandestine assistance and support, as may enable him to continue the war indefinitely; of the exertions of the opposed belligerent being clandestinely counteracted, under the garb of amity; and of neutral dealers reaping unhallowed profit, at the expense of the blood of their neighbours, or of these nations, with whom they pretend to be on a friendly footing.

In the first part of the second volume of his work, Hübner treats of what follows the seizure by belligerent nations, of the vessels of neutral states, and of what he holds to be universally just, with regard to neutral prizes.

In chapter first, after a digression into the nature of the jurisdiction of commercial consuls, in order to show that that jurisdiction depends very much on the conventional arrangements of the nations of modern Europe, rather than upon the general principles of international law, and, at all events, does not affect his enquiry into the competency of the courts by which neutral vessels, captured as prizes, are adjudicated, he proceeds to state the grounds on which he maintains, that the courts of Admiralty, or other Prize courts of belligerents, by which such questions of prize have been, and are determined among the European nations, are altogether incompetent, according to the principles of universal justice, or the primitive law of nations. But we shall delay entering into his detailed reasoning on this point, until we come to notice the work of Lampredi, that the opposite arguments may be placed in juxta position to each other.

In chapter second, he continues his inquiries, who is the competent judge of neutral prizes, according to what he holds to be the principles of the universal law of nations, in the different cases of the vessels being carried into their own neutral ports, or into the ports of the

captors, or into the ports of the enemy of the captor, or into the ports of a third power, also neutral; and gives a "projet" of a new jurisdiction, a combined tribunal; pointing out its advantages.

In chapter third, containing reflections on the procedure in the adjudication of neutral prizes, he observes, that in general, neutral prizes ought to be judged of from their conduct, and from the papers or documents found on board at the time of the capture, not from the papers which their commanders may afterwards produce, unless the latter were absent from violence on the part of the enemy, or from some extraordinary misfortune or disaster, for which the master and owners are not to blame. He next observes that neutral prizes ought to be judged, first, according to the conventional law of nations; secondly, according to the primitive law of nations, or universal code of sovereign states; and he concludes with remarking, that it is incumbent on the captor to prove the legality of the prize, and the infringement of the neutrality.

In chapter fourth, Hübner investigates the declaration, as good prize, of neutral vessels, or their cargoes, as being the decision of a competent judge or tribunal, by which a neutral vessel, seized or captured by belligerents, is recognized or determined to have been lawfully captured, so that the property, with or without its cargo, is transferred or adjudged to the captors, in whole or in part. And, agreeably to the general principles laid down in the first volume, and more fully unfolded in this chapter, he maintains, that no vessel, ascertained upon visitation to be neutral, can be lawfully seized, unless at least found to be loaded with goods contraband of war, for the service of the enemy, nor be confiscated, or declared good prize, unless it shall have infringed the laws of neutrality. Farther, following out the application of

these principles, he proceeds to specify; first, what neutral vessels may be confiscated, with their cargoes, namely, such vessels as are found carrying goods, contraband of war, to the enemy. Second, what vessels may be declared good prize, but the cargoes must be restored; such as not merely vessels belonging to the enemy, but also neutral vessels, where the captain or owners of the vessel, may have violated their neutrality. Third, what vessels and cargoes cannot be declared good prize, according to what he calls the primitive law of nations; namely, neutral vessels which, far from committing any act of hostility against the belligerents, undertake or attempt nothing, which relates, directly, decidedly, and immediately to war and its operations, and which, besides, carry no goods that are contraband, or of the first class before described.

The second part of his second volume, Hübner devotes to the illustration of the Conventional law of nations, properly so called, applicable to the capture by belligerents of neutral vessels, or according to the tenor of the particular treaties, which had been concluded and then subsisted, among many of the modern European powers.

So much for the ingenious and acute work of Hübner. His advocacy of the cause of neutrals led him, in his theory, to represent international law in this department, rather as what he conceived it ought to be, or what it was wished to be, than what it then actually was, as observed in practice. From the works of Valin, Pothier, Emerigon, and D'Abreu, before referred to, it appears, that France and Spain did not adopt Hübner's system, any more than Great Britain, during the war which lasted from 1756 to 1763; and did not, by any means, admit of the rule, which holds the neutral flag to cover the goods of the enemy, except under express

treaty, in a few instances, to that effect. At the same time, with that, and a few other exceptions, Hübner's views with regard to the reciprocal rights and duties of belligerents and neutrals, and the limits of these rights; with regard to the foundation of the right of visitation and search, and the mode in which it is to be exercised; and with regard to the procedure to be followed, in the adjudication as lawful prize, are sound. And the distinction which he makes in his second volume, between what he denominates the general primitive, or universal law of nations, and the particular conventional law of nations, and between the conventional law of nations, as confirmatory of the primitive, or universal, or as altering that law, or as merely regulating indifferent actions, not embraced by that law, are perhaps better founded, and certainly more clear and perspicuous, than the views of that matter subsequently taken by Martens and Klüber. Of the powers of independent nations, by treaty or convention, not only to regulate such actions or proceedings as are matters of indifference, under the general principles of international law, but also to alter that law with regard to themselves, and to give up certain clear rights, on condition of a similar or equivalent surrender on the side of the other contracting party, or of a counter-grant of other corresponding advantages, there can be no doubt. And so far as such treaties extend, and so long as they endure, they unquestionably constitute the particular conventional written law of nations.

From the preceding short account, too, of Hübner's work, it appears, that the principles of the universal law of nations, conceived by him, as founded on the nature of things, and resulting from the formation of civil societies, coincide, with a few exceptions, with the rules which we have seen to have been recognized by

the Jurists of the different European nations from Grotius to Vattel, and with the previous practice of most of these nations, except France and Spain; who, down to near the middle of the eighteenth century, held the hostile vessel to confiscate the neutral cargo, and the hostile cargo to confiscate the neutral vessel. The two grand exceptions which Hübner makes in his system, are, that the neutral flag ought to cover the hostile cargo, in all cases; and that the Admiralty, or other courts, hitherto established by the different nations of modern Europe, for the adjudication of maritime prizes, are incompetent tribunals. And to these important points we shall revert, when we come to notice the works of Lampredi.

JENKINSON, LORD LIVERPOOL.

Beside the two important doctrines just alluded to, there came to be much discussed, during the war we are now contemplating, which began in 1756, and ended in 1763, namely, the question whether a neutral nation had a right to carry on the colonial trade of one of the belligerents. This was designated by several continental writers, and lately by the American lawyer, Dr. Wheaton, a new pretension on the part of Great Britain. But this statement is not correct. The general doctrine was not then new in the law. Even so long before as 1697, we have seen, Baron de Cocceii, after laying down, as *Prima Regula*, *Orto inter duos populos bello, non excludi Jure Gentium pacatos, a libero cum hostibus commercio*, proceeds, “*verum, initio, Primae Regulæ fines, ritè constituendi sunt. Illa, igitur restringi debet* (1) *ad commercia pacis, non belli, seu quæ propria bel-lorum sunt, uti durante bello, arma ministrare; is enim actus excedit commercia pacis; eoque magis assistitur hosti in bello, quam commercium pacis cum eo exerce-*

tur;" thus, besides excluding contraband of war, limiting the right of neutrals to carry on such commerce, as existed in time of peace, and excluding what was opened, or created by the war.

Farther, it appears from certain passages in M. Arnould's history of the commercial relations, and the balance of trade of France,* that the war of 1756 was not the first instance, in which the protection of the colonial trade of France, by the intervention of neutral privileges, had been made a device and stratagem of war; and that it was so far at least counteracted in effect, by Great Britain, in the preceding wars of that century, as to be immediately abandoned. "The fluctuations of policy thus abruptly pursued by France, best explain how it may have happened, that the principle did not assume its more distinct character prior to the war of 1756. As a measure of practical hostility, it would necessarily follow, and be dependent on the subject against which it operated; the encreasing importance of this branch of the resources of France, and the policy observed with respect to it." But at whatever time this doctrine may be held to have been introduced or established generally, there obviously is, and was then, as well as now, not merely room, but solid ground, for distinguishing between trading with the enemy generally on the high seas, in innocent merchandise, and trading between the mother country and the colonies of the enemy.

"The general rule, that neutrals cannot legally trade to the colonies of belligerents, is deducible from the most clear and admitted principles of the law of nations. A belligerent has a right, so far as his enemy only is concerned, to distress, and even to annihilate the commerce of that enemy. That right, however, is restricted

* See Rob. Adm. Rep. vol. VI. App. Note I.

by another belonging to neutral nations, namely, the right to carry on their accustomed trade. But the colonial trade being a branch of commerce, from which neutrals are excluded in time of peace, they can suffer no injury, by not being allowed to engage in it during hostilities. On the contrary, it is their known duty to abstain from such a trade; inasmuch as it is an obvious and undoubted principle of general law, that neutrals are not to interpose in war, so as to afford to one enemy a manifest aid or relief, from the pressure of his adversary; *hostem, hosti imminenti eripere*. This is an admitted principle, in respect to its intrinsic merits and propriety, whatever difference of opinion may sometimes arise, as to the particular circumstances which are necessary to warrant the application of it. In short, since the consequences of the colonial system have formed so important a source of wealth and prosperity to the Maritime States of Europe, the general principle applied to cases of this description, has been, that the fundamental maxim of the trade being founded on a system of monopolizing to the parent state, the whole trade to and from the colonies, in time of peace, it is not competent to neutral states, in time of war, to assume that trade, on particular indulgences, or on temporary relaxations, arising from the state of war; that such a trade is not entitled to the privileges and protection of a neutral character.”*

To return to our historical narrative. In the course of the war 1756—63, the superior naval force of Great Britain had so crippled the mercantile navy of France, that the government of the latter country found great difficulty in supplying their American colonies with stores, and in bringing to Europe the produce of these colonies. Amid these difficulties, the French govern-

* Rob. Adm. Rep. vol. IV. App. Note A. p. 1, 7, 8.

ment thought of taking the aid of neutrals. And the neutral maritime states, who had larger mercantile navies than their own proper commerce required, the Dutch particularly, who had succeeded the Hanse towns in engrossing the greater part of the carrying trade of Europe, were quite disposed to take advantage of this state of matters, which the superiority obtained at sea by the one belligerent over the other had created, and to relieve the French from their difficulties, by carrying on for them, at profitable rates of freight, their colonial as well as their coasting trade, under the cover of the neutral flag.

To this undue interjection of neutral aid, not admitted in time of peace—to this extension of neutral commerce, directly in consequence of the wants of the war, and directly subversive of the superiority which the one belligerent had obtained over the other, the Government of Great Britain did not consider itself bound to submit, and ordered the capture of such neutral vessels as should be engaged in such an unneutral trade. And as this measure excited great clamour on the part both of the French and Dutch, Charles Jenkinson, Esq., afterwards Lord Liverpool, published in 1757, his Discourse on the conduct of the Government of Great Britain in respect to neutral nations. As this valuable work was again published in 1794, and a third time in 1838, in a collection of scarce and valuable tracts, it would be superfluous here, to give any lengthened account of it. But it forms so important an article in the history of the Maritime international law of Europe, that it may be proper in this sketch, to quote the result of this able statesman's reasoning and historical deductions.

“Let us now look back on what has been said: the deduction which I have made hath, I fear, been tedious; but the importance of the subject, by force, led me into

it. I flatter myself, however, it has appeared, that reason, authority, and practice, all join to support the cause I defend: by reason, I have endeavoured to trace out these principles, on which this right of capture is grounded; and to give that weight to my own sentiments, which of themselves, they would not deserve, I have added the authorities of the ablest writers on this subject; and lastly, I have entered largely into the conduct of nations, that I might not only lay, thereby, a broader foundation for this right, but that I might the more fully illustrate, by the extravagant pretensions of other states in this respect, the present moderation of England: no age or country, ever gave a greater extent to the commerce of neutral nations; and we have seen, that most in the same circumstances, have confined it within much narrower bounds.

“There remains still, however, one objection to what has been said, and that of so plausible a cast, that I cannot leave it without an answer. It has been pretended, that the liberty of navigation has been destroyed by means of these captures, and that a violent restraint hath been put on the lawful industry of mankind. The liberty of navigation, in fair construction, can mean no more than the right of carrying to any mart, unmolested, the product of one’s country or labour, and bringing back the emoluments of it; but can it be lawful that you should extend this right to my detriment; and when it was meant only for your own advantage, that you should exert it in the cause of my enemy? Each man hath a right to perform certain actions, but if the destruction of another should follow from them, would not this be a just reason of restraint? The rights of mankind admit of different degrees, and whenever two of these come into competition, the lowest in the scale must always give place to the higher. But you will say,

that you have a profit in doing this; if, however, it is otherwise unjust, will that consideration convert it into a right? If you mean, that your own commerce ought to be free, that right is not in the least denied you; but if under this disguise, you intend to convey freedom to the commerce of the enemy, what policy, or what justice can require it? What can neutral nations desire more, than to remain, amid the ravages of war, in the same happy circumstances, which the tranquillity of peace would have afforded them? But can any right from hence arise, that you should take occasion from the war itself, to constitute a new species of traffic, which in peace you never enjoyed, and which the necessity of one party is obliged to grant you, to the detriment, perhaps destruction of the other? If this right was admitted, it would become the interest of all commercial states, to promote dissension among their neighbours; the quarrels of others would be a harvest to themselves; and from the contentions of others, they would gather wealth and power. But, after all, the rights of commerce are not the real cause of this dispute; and liberty of navigation is only a fair pretence, which ambition hath thought fit to hold forth, to interest the trading states of the world in its cause, and to draw down their indignation upon England. This is not the first time, that a deceit like this has been practised. When the power of Spain was at its greatest height, and Elizabeth wisely contended against the mighty designs of Philip, the capture of some vessels belonging to the Hanse towns, gave occasion to a contest of this nature: but they were the emissaries of Philip, that then blew up the flame; and pretending a love to commerce, promoted the ambitious projects of their master. The Queen of England published an apology for her conduct; and this was answered in a virulent and abusive manner, not from any of the

Hanse towns, but from Antwerp, a city under the dominion of Spain; and it seemed to be written, (says Thuanus), ‘per hominem Philippi partibus addictum, non tam pro libertate navigationis, et in Germanorum causâ defendendâ, quam in Hispanorum gratiam et ad Reginae nomen proscindendum.’ The interests of commerce were the pretended cause of dispute; but the real cause was the interest of Philip.” The pretended design was, to preserve the liberty of navigation; but the real end was, to serve the cause of ambition, and to destroy the government of England. This case need not be compared with our own at present; the resemblance is too obvious.

MARRIOTT.

Farther, in 1759, Dr. Marriott published a pamphlet, entitled, “The case of the Dutch ships considered.” In this pamphlet, the author undertook to prove, that neither by the common principles of neutrality, nor by virtue of subsisting treaties, had the Dutch, in the then existing war between England and France, any right to cover the property of the enemy of England, going to, or coming from, the colonies of that enemy, directly or indirectly, through the medium of the Dutch colonies, nor to carry to the colonies of France, directly or indirectly, any commodities, though neutral property, which had a tendency to support the enemy.

The question, what was the fair and sound construction of the treaties then subsisting between England and Holland, has now ceased to have any interest. But it may be proper to quote, what Dr. Marriott lays down as the rules of International law, in this department, then recognized by England.

“By writers upon subjects of this nature, of every country, and of the highest authority, and by the common usage of all nations, it has been constantly DETERMINED.

"That in a war between two nations, each enemy may lawfully take, seize, and possess himself of the property of his opponent, wherever it can be found. From this principle, it follows, especially considering how widely commercial interests are diffused, that it is an actual impossibility, for two great and maritime powers to engage in a war, but the intercourse of all the rest must be liable to be disturbed.

"In such a case, the advantages of a neutrality are necessarily mixed with inconveniences, which must be submitted to, or the neutrality must be renounced.

"If the goods of enemies may be lawfully seized, wherever they are, then it follows, that they certainly may be seized on board the ships of neutrals.*

"Every ship going to, or coming from, the port of an enemy, is strongly attended with a presumption of enemy's property.

"Neutrals cannot continue friends, if they protect an enemy, or goods of enemies; because an impartial conduct is the very idea of neutrality.

"It is incumbent upon neutrals, to remove a presumption that is against them, by a justification of themselves, and by submitting to a proper enquiry, without fraud or resistance.

"Neutrals, therefore, may be justly *detained*. Neutral property may be *confiscated*, as illegal, in its destination, from relative circumstances.†

* How far the States of Holland, themselves, have carried this doctrine, in their own conduct towards neutrals, confiscating both ships and cargoes, is to be seen from the Placarts quoted in the appendix to this case.

† "Magnum sane, aliquando, momentum in bellis, habent etiam res minimi momenti; si hostis laboret inopiâ; nec rerum istarum, aliunde, copia sit. Saepe urbes, munitissimae, ob herbae istius combustibilis, vel vini adusti inopiam fecerunt, et famem facilius tolerare militem praesidiariam, quam rerum illarum desiderium. Quis ergo neget ?

“Relative circumstances, by the constant practice of nations, have made all commodities, which are destined for places belonging to the enemy, blocked up or invested, to be considered as prohibitable in their nature, or in other words, contraband; because they tend to uphold the enemy in a condition of distress.

“Commodities, the property of neutrals, having this tendency, and destined for the colonies of the enemy, which are the object of the war, and under circumstances of distress, are therefore contraband.

“Ships, the property of neutrals, may be confiscated upon different accounts; upon one, in view of punishment of bad faith, for a breach of neutrality, in carrying contraband; upon another, when sailing under the special license of the enemy, as the adopted property of the enemy.

“It appears, therefore, that the subjects of Holland have no right to trade with the enemies of Great Britain, without being subject to enquiry, at least; nor in the unlimited manner in which they now pretend to do it, so far as the principles of mere neutrality, and of the law of nations are concerned.”

tum cives, tum *exteros*, male mereri de Republicâ, qui talia suppeditant hostibus nostris, sine quibus facile adigi ad deditionem potuissent. Adeo verum est, belli temporibus, commercia non modo inter hostes cessare, verum etiam amicis et neutrarum, partium gentibus, non promiscue permitti negotiationem, cum hostibus, (nisi sibi hæ securitatem a belligerante, utroque, stipulentur.) Quum enim hoste in hostem, in infinitum, omnia liceant, quæ ad debellandum, illum sunt necessaria, licebit, sane, et gentem amicam, impedire, quo minus hosti res, quibus *validior* instructiorque, ad bellum gerendum, fiat, advehere possit, sicut jam supra vidimus.

Sin hostes nostri, cum gente exterâ nobisque amica negotiantur, eo minus dubitare licet, quin fas nobis esse oporteat, illa commercia *turbare*; et id agere, ne quid ex illis *lucri* ad hostes nostros redeat.” Heineccius, Sylloge 11. Exercitat, 30. § 12.

ABBÉ DE MABLY.

During the period we are now surveying, there also appeared successive editions of the popular work of the Abbé de Mably, in three vols. octavo, entitled, *le Droit Public de l'Europe fondé sur les Traités*. In this work the author embraces the law of nations generally; and, of course, only a small part of it is devoted to Maritime international law; chiefly Chap. XI. Vol. II. and Chap. XVI. Vol. III. And as the work is more generally known in this country, than most continental works of that description, and, although interspersed with philosophical observations by the talented author, is, as its title announces, pretty much confined to that portion of International law, which is created by treaties, it does not appear requisite to make very long extracts, or to do much more, than to examine the author's views with regard to what is called the conventional law of nations.

In the following passage, in his preface, the author explains the plan upon which he composed his work, and what he understood by the terms, conventional law of nations. "Les Compilateurs laborieux, qui nous ont donné des Recueils complets de Traités, ont, sans doute, rendu un service important au Public; mais leur travail laissoit encore bien des choses à desirer. Il ne suffisoit pas, que quelqu'un, osant affronter la lecture de nos corps diplomatiques, se donnât la peine de faire des analyses des Traités, de façon, qu'on en eut en peu de mots, toute la substance, et que ces analyses servissent de table des matieres, aux personnes employées dans les affaires, et que leurs fonctions obligent souvent à consulter ces sortes d'actes. Il falloit encore, pour rendre plus aisée, plus utile, et plus sure, l'Etude du Droit Public, rapprocher les Traités, qui ont rapport à une même affaire, les montrer sous un même point de vue

et en extraire les articles, qui, du consentement des parties contractantes, ont terminé définitivement, leurs querelles, formé leurs alliances, et acquis entre, les nations, la même autorité, que les loix civiles ont, entre les citoyens d'un même état."

It is, no doubt, going too far, as our author seems to do, to ascribe to any treaties or articles in treaties, the same authority among nations, as the internal or municipal laws of a state have over its citizens or subjects; if we reflect that in the latter case, the entire force of the community is concentrated in the sovereign power, and exercised by the government in the enforcement of the law. But, subsisting treaties, and, of course, articles selected from such treaties, and methodically arranged, as proposed by the Abbé de Mably, although by no means equivalent in physical force, have certainly a legal or juridical force, similar or analogous to the municipal law of a state, inasmuch as nations, individually or in combination, are entitled to use, and do use force, for securing the observance of these articles.

Here the author does not seem to ascribe this force to such selected and classified articles, unless the treaties out of which this systematic code is formed, be still in existence. And so far we agree with him; and also in the following passage of Chap. XI. Sec. XII. Voll. II. p. 451, where he holds such treaties to subsist, and to have the force of law, where they have not been entered into for a limited time.

Après ce que j'ai dit, du commerce, des Européens, qui s'étend dans toutes les parties du monde, qui établit entre eux une relation journalière, et expose leur cupidité à des discussions fréquentes, on doit sentir, qu'il a été nécessaire, de les soumettre à des Loix Je ne parlerai pas ici de certaines conventions peu importantes, qui ne peuvent causer, que des Procès entre des particuliers,

et dont la connoissance regarde les Juges de l'Amirauté. Après avoir parlé en détail, de tout ce qui concerne le Droit commune des nations sur mer, et des conditions generales qui servent de base à tous les Traités de navigation, et de commerce, Je rapporterai, les engagements particuliers, que les Puissances de l'Europe ont contracté jusqu' en 1740; et qui ont force de Loi, parce qu' ils n' ont point été pris, pour un tems limité.

But, if in the passages before quoted, or in the passages in Chap. XI. Vol. II. p. 459, 467, hereinafter recited, by the terms Conventions Generales, touchant la Navigation et Commérce, is he understood, or meant to maintain, that these general, ordinary, or frequent articles of stipulation, in various simultaneous or successive treaties, when thus systematically arranged, had acquired the binding force of law beyond the contracting parties, and independently of the continued subsistence of the treaties, from which the articles have been extracted, we must protest, as formerly, against such doctrine, as equally inconsistent with the earliest feelings of justice, as with enlightened legal principle in more cultivated ages. And, while we admit that a presumption arises in favour of perpetuity having been the intention of parties, where the stipulations and engagements are not for a limited time, it is impossible to place out of view, the various events by which treaties may be annulled or dissolved, or terminated, beside the lapse of a stipulated period; and particularly the occurrence of hostilities, after which, it appears from the uniform practice in European negotiations, an express renewal is held indispensably necessary, to revive and again give effect to previous treaties.*

As the summary of general conventions concerning navigation and commerce, given by the Abbé de Mably, is very concise, it may be worth while to quote the

* Martens, *Precis*, § 63. Klüber, § 154, § 164, § 165.

greater part of it, as showing what he understood to be the conventional law of Europe, in such matters, during the times in which he lived.

“Les Navires Marchands obligés par la tempete, ou par quelqu’ autre accident de relâcher dans un port, ne payent les droits, que pour les marchandises, qu’ ils mettent à terre, et ils sont libres de ne décharger, que celles, qu’ ils jugent à propos. A l’ egard des vaisseaux de guerre, il est d’ usage de régler le nombre de ceux, qui peuvent entrer dans un port; et ce nombre est ordinairement de six vaisseaux.

“On ne peut arrêter les Marchands, les maitres de navire, les pilotes, les matelots, ni saisir leurs vaisseaux, et leur marchandises, en vertu de quelque mandement general, ou particulier, pour quelque chose que ce soit, de guerre, ou autrement, ni même sous pretexte de s’ en servir pour la defense du pays. On excepte cependant les saisies et arrêts de Justice faits par les voies ordinaire, pour dettes, obligations et contrats legitimes.

“En cas de guerre, il est permis aux nations neutres de commercer avec les puissances belligerantes, pourvu qu’ on ne leur porte point de marchandises de contrebande; sous ce nom on comprend tout ce qui sert a l’ usage de la guerre, soit offensive, soit defensive: mais non pas les choses, nécessaires à la sustentation de la vie. En general, tout commerce quelqu’ il puisse être, est défendu avec une place, qui est assiegée ou bloquée.

“Un vaisseau ne doit point se mettre en mer, qu’ il ne soit muni de lettres et de certificats, qui fassent connoître son nom et son port, le nom du domicile de son maitre, ou de son capitaine, les espèces de sa charge, le pays d’ ou il est parti, et celui pour lequel il est destiné, à fin qu’ on puisse juger, s’ il ne porte point de marchandises confiscales, et de prevenir les fraudes des prête noms. On convient ordinairement de la forme, dans

laquelle, sont faites ces lettres de mer; et des personnes qui doivent les delivrer.

“Dans le cas, qu’ un vaisseau en veuille visiter un autre, il ne lui est permis d’ en approcher, qu’ à une certaine distance, par exemple, à portée du canon; il envoie alors sa chaloupe, pour faire la visite. On ajoute foi aux lettres de mer présentées par le maitre du navire. Si l’ on trouve à bord des marchandises de contrebande, on les confisque, sans toucher au reste de la charge; a moins que le capitaine du vaisseau n’ ait jetté ses papiers à la mer, ou qu’ il n’ ait refusé, d’ amener ses voiles.”

In the next paragraph, the author points out the admitted illegality of a general blockade by notification, without an actual adequate force; and notices the instances of this formerly mentioned.

“Il est défendu de se saisir des marchandises de contrebande chargées sur un navire, avant que l’ inventaire en ait été fait par les juges de l’ Amirauté; à moins que le patron ne consente à les livrer, pour continuer sa route.”

“Une nation est en droit de confisquer tous les effets d’ une puissance neutre, qui se trouvent sur un navire ennemi, si le chargement n’ a pas été fait avant la déclaration de la guerre, ou dans de certains termes, dont on est convenu. Cependant si un chargement fait avant la déclaration de la guerre, ou dans les termes prescrits, contient des marchandises de contrebande, il est permis de s’ en saisir en payant leur juste valeur: ou bien le maitre du navire, se chargera d’ apporter un certificat, pour prouver, qu’ il ne les aura pas débarquées dans un pays ennemi.

“Les peuples, qui font entre eux des traités de commerce, s’ accordent toujours liberté de porter respectivement les uns chez les autres, toutes les marchandises qui ne sont pas prohibées, par les loix de l’ etat, avec

clause de confiscation pour les autres. Les commerçans sont protégés; et afin, qu' on ne leur fasse aucune mauvaise difficulté, on doit afficher dans les Bureaux des Douanes, les tarifs pour tous les droits d' entrée et de sortie. On leur accorde le liberté de conscience; ils sont libres de se servir, de tels avocats, procureurs, notaires, solliciteurs, et facteurs, que bon leur semble. Ils tiennent leurs livres de compte et de commerce dans la langue, qu' ils jugent à propos; et s' il étoit nécessaire de les produire en justice, pour decider de quelque procès, le juge ne peut prendre de connoissance, que des articles, qui regardent l' affaire contestée, ou de ceux, qui doivent établir la foi de ces livres.

“ Un Prince s' engage toujours de defendre, sous les plus grieves peines, à tous ses sujets de prendre des commissions, ou des lettres de represailles, de quelque estat ennemi, de la Puissance, avec laquelle il traite. Il promet même de n' accorder des lettres de represailles, qu' en cas de deni de justice, &c.

“ Si un vaisseau échoue sur les côtes, tout ce qu' on en sauvera, sera rendu aux propriétaires, pourvu qu' ils payent les frais du sauvement, et que leur reclamation soit faite dans l' an, et un jour. On s' engage a ne recevoir dans ses ports aucun pirate. Enfin il est assez ordinaire, que les maitres d' un navire armé en guerre, et en course donnent avant leur departure une caution, qui reponde, des contraventions, qu' ils pourvoient faire, aux traités.

“ En cas de rupture, on convient aussi que les sujets des parties contractantes auront un certain temps fixé, apres la declaration de guerre, c' est ordinairement un terme de six mois, pour vendre leurs marchandises, et les transporter, ou bon leur semblera. Jusqu' à l' expiration du terme convenu, ils doivent jouir d' une liberté entière. Sans cette convention, qui n' est pas

ancienne, les commerçans, seroient continuellement inquiets; au moindre mouvement, qui sembleroit menacer d'une rupture, chacun se hâteroit de retirer ses effets pour prevenir sa ruine; et il est aisé de juger, quel tort le commerce souffriroit de ces interruptions."

On the passages just quoted, it may be remarked, that while he exhibits these general articles of convention, as sanctioning the confiscation of the effects of a neutral power, found on board a hostile vessel, contrary to the uniform milder practice of England, to confiscate only the hostile vessel, and to release the neutral cargo; the author does not pretend, that this conventional law authorized neutral vessels to cover and protect hostile property from seizure as prize, in the open sea. It may also be remarked, that Mably expressly holds out this conventional law, as sanctioning the visitation and search of neutral vessels, provided it be conducted in a certain suitable manner.

CHAPTER IX.

OF MARITIME INTERNATIONAL LAW, CHIEFLY DURING WAR,
IN THE COURSE OF THE PERIOD FROM THE WAR
WHICH COMMENCED IN 1776, TO THE WAR
WHICH COMMENCED IN 1793.

SECTION I.

OF the works of the other international jurists, besides Hübner, Lord Liverpool, Sir James Marriott, and the Abbé de Mably, which appeared about this time, the chief, those of Wolff and Vattel, have been already noticed, as confirmatory of the rules of Maritime international law previously in practice; and none of the others appear, like Hübner, to have advocated any change in point of principle, or introduced any new doctrine: we proceed, therefore, to the next period we are to contemplate, namely, from the year 1776 to 1793.

RUSSIAN ARMED NEUTRALITY.

The grand event of the earlier part of this portion of the 18th century, was the revolt of the British American colonies, and the war which terminated in the recognition of their independence. This revolt afforded a favourable opportunity for the larger European nations, who were the rivals of England in her Maritime greatness, and also

for the minor European states, whose subjects desired to profit by the disputes and wars of the larger states, to support the cause of the revolted colonies, and thereby to distress, humble, and reduce the power of the mother country. France, we have seen, had been distinguished during the 16th, 17th, and earlier part of the 18th century, by the greater rigour of her administration of Maritime international law, inasmuch as the hostile vessel was held to confiscate the neutral cargo, and the hostile cargo to confiscate the neutral vessel; and it was not till the reglement of 1744, that this rigour was relaxed, by directing that, while the hostile cargo was confiscated, the neutral vessel should be released. Farther, after France had taken part in the war between England and her American colonies, it appears, that in 1778, either feeling, or dreading the superiority of the warlike marine of England, the French government thought of again resorting to the expedient adopted in the war of 1756—63, that of opening to neutrals during the war, the commerce with their West India colonies, from which, agreeably to the system of the European powers generally, they were excluded during peace. But, while such a measure was perfectly legal on the part of France, or any other country, England could not recognize as neutrals, to whatever country they might belong, vessels, which at the request, or with the permission of the enemy, thus embarked in a trade, from which they were excluded during peace, and which was created by the events of the war, in order to supply with stores the colonies of the enemy, and bring home their produce. Such neutrals thereby counteracted, and so far defeated, the force which England had exerted, or was prepared to exert in that direction; and the British admiralty courts would have continued to hold the cargoes, at least of those vessels, which afforded such material assistance to

the enemy, as lawful prize, had not the French government latterly abandoned this scheme, and adopted the plan of supplying their colonies, by employing their national ships of war, as convoys for protecting their own merchant vessels. And that, in adopting this plan, the French government acted more wisely, appears from a short French anonymous brochure, published in 1779, entitled, "*Considerations sur l'admission des navires neutres aux colonies Françaises de l'Amerique en tems de guerre;*" the manuscript of which little work, is stated to have been found among the papers of a judge, well known by his love of literature.

But while she thus adopted the plan of protecting by convoys, her own merchant vessels, trading to her colonies, France now found it politic to make other concessions of a different description to neutral traders. It was only in 1744, that she relaxed her rigorous practice in the two important particulars before alluded to, so as to render it conformable to what had been recognized by other nations, as the Maritime law of Europe, from the ages which preceded the compilation of the *Consolato del Mare*. But now, the French government, by the reglement of 1778, not only relieved neutral vessels, carrying contraband goods to the enemy, from confiscation, unless the contraband goods amounted to three-fourths of the value of the cargo, but also what was of more importance, prohibited French privateers from stopping and conducting into French ports, the vessels of neutral powers, although they should have sailed from, or should be destined to, the ports of the enemy; with the exception of those which should carry assistance to besieged or blockaded places; under the reservation, however, and condition of the powers, then enemies of France, making a reciprocal concession, within six months of the

publication of the reglement; Emérigon, *Traité des Assurances*, Chap. XII. Sect. 19. Tom. 1. p. 450—1. And, from similar interested considerations, the Empress Catherine of Russia exhibited, about the same time, the rather singular and curious political phenomenon of the most despotic sovereign in Europe on land, heading a crusade to establish by compulsion, the unlimited liberty of the seas.

The greater and smaller states of Europe, are undoubtedly well entitled to combine, for the purpose of repressing or preventing the aggressions of an ambitious and powerful state, aiming at universal empire, as in the cases of the Emperor and King Charles V., of Louis XIV. and of Napoleon. But whether it was right and just in the case we are contemplating, for the other maritime powers of Europe, to take advantage of the intestine dispute between Great Britain and her American colonies, and to combine for the purpose of concussing the British people, when involved in that unhappy contest, into the adoption of a new rule, or to enforce against that people a new rule, different from the previous practice for centuries, obviously advantageous at the time, for these different powers, but as obviously disadvantageous for that people, impartial posterity will judge, if it has not already pronounced its verdict. The fact is undoubted, that great efforts were then made throughout Europe, for the accomplishment of this object.

In Feby. 1780, the Empress of Russia caused to be transmitted to the powers then at war, a declaration bearing in substance: that neutral vessels may navigate freely, from port to port, and upon the coasts of the nations at war; that effects belonging to the subjects of the powers at war, are free on board neutral vessels, with the exception of articles contraband of war; that such goods, only, are to be considered contraband, as those

enumerated in the tenth and eleventh articles of the treaty of 1766, between Russia and Great Britain. That to determine what characterizes a blockaded port, this denomination is only to be given to a port where there is evident danger in entering, in consequence of the disposition of the force attacking it, by the ships of war stationed sufficiently near; and that these principles are to serve as rules, in adjudicating upon the legality of prizes.

Concurring so far in the same scheme, the King of France, in August of the same year, 1780, addressed a letter to the admiral, giving general instructions, "that no interruption be given to the navigation of neutral vessels, although the destination of their cargo may be for the ports of the enemy, and that the vessels shall not be arrested or stopped, unless there be the strongest reasons to believe, they belong to the subjects of the King of England, who disguise or conceal their flag, and hoist that of some neutral power, in the hope of avoiding search, or, unless the vessels are carrying to the enemy contraband goods, such as arms, or any description of warlike stores." This royal letter, M. Emérigon justly observes, comes to the aid of the thesis maintained by Hübner, Tom. I. Part II. Chap. 2, "*que suivant les arrêts de la législation universelle, le Pavillon couvre la cargaison.*" But that estimable lawyer (Emérigon) does not hazard any farther remark, than to refer for consultation on this point, to a long list of jurists, from Roccus, Marquardus, and Grotius, to Vattel and Valin, who all lay down a different doctrine.

In his answer, the King of Spain stated, that the principles adopted by the Empress, were those which had always regulated his conduct; but added, that as the English marine had not respected the neutral flag, he had felt himself under the necessity of imitating it, by

taking precaution for the protection of his subjects, against the great mischief which would result from conduct so unequal.

Having adopted the views of Russia, Denmark, and Sweden, made similar declarations to the belligerent powers, and in July, 1780, concluded an alliance with Russia, which came to be called the armed neutrality. To this alliance of the three courts of the north, the other powers of Europe were invited to accede. In December of the same year, the States' general of the United Provinces resolved not only to accede to this alliance, but to take an active part in promoting the establishment of the principles which it recognized, and concluded a treaty to that effect. In the course of the two following years, the King of Prussia, the Emperor of Germany, and the Queen of Portugal, also in substance acceded.

To the communication and declaration of the Empress of Russia, the government of Great Britain replied, that it regulated its conduct towards neutrals, by the clearest and most generally recognized principles of the law of nations, which is the only law among nations, who have not entered into treaties; and according to its own different contracts or conventions with other powers; and that in controverted cases, the courts of admiralty would cause reparation to be made for any damage which might have been occasioned, in a manner so equitable, that her Imperial majesty would be completely satisfied with their decisions.

LA LIBERTÉ DE LA NAVIGATION.

In support of the new doctrines contained in this imperial declaration, and in illustration of the principles upon which the system of the armed neutrality was founded, there appeared in the month of April, of the

same year, in French, though bearing to be published "à Londres, et Amsterdam," 1680, an anonymous work, entitled, "La Liberté de la Navigation et du Commerce des nations neutres, pendant la guerre, considérée selon le droit des gens universel, celui de l'Europe, et les traités." And in the course of the same year, a translation of this work into German, was published at Leipsic.

In this anonymous work, which Von Kamptz in his "Neue Literatur des Volkerrechts," 1817, p. 290, ascribes decidedly to Prof. Cobald Totze of Bützow, the author finding that the Maritime international law, which we have seen, had been practised by the European states, both great and small, for upwards of four centuries, with little deviation, except by special bargains between particular states, or conventional treaties, did not suit his advocacy of the claims of neutral traders, or the views of the patroness of the armed neutrality, seems to have resolved in that spirit of rash innovation, which characterized several of the southern nations of Europe, towards the close of the eighteenth century, to put out of view everything old, as mere error and prejudice, or gross wrong and injustice, tyrannical oppression, tamely submitted to. Accordingly, he does not trouble himself with ascertaining, what, in point of legal principle, had been laid down as Maritime international law, by the successive jurists of the different European nations, in the course of the last four or five centuries; or what had been the reciprocal conduct and practice of these nations in their maritime intercourse during war, when not affected by special agreement between two or three contracting parties. Setting aside all the old, as erroneous and unjust, he embraces in his theory only what he calls the new rules of the Maritime law of nations; and the only thing in the shape of practical authority, to which he appeals, are the points which different

European nations have, by special agreement fixed in their treaties, as constituting what he denominates, "le nouveau droit des gens Européen, qui a subsisté jusqu'ici." But apparently not considering even this new conventional law as very valuable, or permanently effective, and sufficient for his purpose, he rises in his zeal for the establishment of the claims of neutrals, to what he conceives to be le droit des gens universel naturel, as distinct from le droit des gens particulier Européen. And encouraged by the countenance of the imperial confederacy of the northern nations, and also by the general approbation and apparent acquiescence of France and Spain, though only conditional and temporary, this author followed out the views contained in the work just mentioned, by publishing in 1782, at Leipsic, another work, entitled, "Essai sur un Code Maritime general Européen pour la conservation de la liberté de la navigation, et du commerce, des nations neutres en tems de guerre."

On perusal, it will be found that neither of these works contain so much an accurate record of what the Maritime international law of Europe had been, or then was, but rather an exposition of what the author conceived it should be. Indeed, this is announced by the editor at the conclusion of his avant-propos. "Voilà le plan, que l'auteur a suivi dans cet Essai. Il ne s'est pas arrêté aux opinions des savans, même de ceux de noms très célèbres, qui pourroient être différentes de ses principes; mais il a traité sa matière selon ses propres idées, remettant, au reste, le tout au jugement et à la discrétion du lecteur impartial et équitable." It may not, therefore, be requisite, in this chiefly historical sketch, to give a very detailed account of them. At the same time, as the treatise, entitled, "La Liberté de la navigation et du commerce," whether it is to be ascribed, according to Von Kamptz, to Prof. Cobald Totze, or

not, whether in its French or German dress, certainly exhibits in the author very considerable talent, and appears to have had a good deal of influence on the public opinion of the continent, it may be proper shortly to examine the doctrine it contains. Confining himself, in a great measure, to the stipulations in the treaties, which the European nations have concluded with each other, since about the middle of the seventeenth century, the author almost passes over in silence, or at most, only slightly touches upon, the general international usages, which we have seen, had gradually been adopted and come to be recognized in practice, prior to that date, as evidenced by the collections of the *us et coutumes de la mer*, and by the writings of international jurists; and likewise almost entirely omits the concomitant and subsequent administration, by the different European states, of Maritime international law, when not modified and superseded by such treaties, but as guided by the wisdom of the able jurists, whose works we have already noticed, and as evidenced by the statutes, ordinances, edicts or proclamations, and judicial determinations of particular states. Whether this omission was intentional or not, it is not for us to decide; but even although it was intentional, it may admit of apology, from the consideration that, while his work is of a superior order, and entitled to the appellation of a scientific treatise, the author, if not actually employed, came forward as the advocate of a large party or interest, in the European commonwealth of nations, and as such, might not be bound to narrate fully, facts or events adverse to the cause of his clients, or at least to the cause which he had espoused.

At the outset, the author very properly distinguishes between what he calls *Le Droit des Gens Européen*, and *Le Droit des Gens universel*; and observes, that the

former is to be first consulted, and then the latter, as supplying its defects. His view of *le Droit des gens universel* corresponds very much with that of Hübner; displaying, perhaps, more acute discrimination, and better arrangement of matters. But any farther consideration of this part of the work we postpone until we come to the discussion of Hübner's similar general doctrines, as reviewed and criticised by Lampredi. It may here, however, be proper to notice at greater length, what the author denominates *le Droit des gens Européen*; as he appears to be the first who stated distinctly the foundation of what has been called the new Maritime international law of Europe; the existence of which, many subsequent international jurists appear to have gratuitously assumed and recognized, without troubling themselves to examine so minutely, or to state so distinctly as Professor Totze, its supposed origin and foundation.

A very important branch of the *droit des gens Européen*, is properly expounded, as being *le Droit Conventionel*, if we understand by that term, the aggregate of the various stipulations and counter-stipulations contained in the successive treaties, concluded between, or among, the different European nations, so far as binding upon the contracting parties, and as having been, or still being in force. But not satisfied with the actual contents, or true legal import of these treaties, as binding only on the contracting parties, during the period of their endurance, and finding his theory would not be supported by the actual practice and usages of nations, as evidenced by their legislative enactments, ordonnances or reglemens, edicts or proclamations, and judicial determinations, with regard to the intercourse of their respective subjects, the author, in order to construct a basis for the new Maritime law he

wished to introduce, resorts to the treaties among nations, not merely as binding the contracting parties, but as somehow or other, operating upon third parties who have never entered into any such contracts, or have done so only with a few other states, on particular occasions, and for particular considerations. That all justice, however, may be done to the reasoning of the author, in support of what he calls the "new Maritime Droit des gens Européen," as different from the Droit des gens Universel, and as distinct also from the Droit des gens Conventionel, strictly and properly so called, namely, as binding only on the contracting parties, and to the extent of the obligations undertaken by such treaties-conventions, it may be right to quote his own words.

§ IV. "Au Droit des gens Universel, il y est opposé, le Droit des gens particulier ou Européen; celui-ci n'est pas immédiatement fondé sur le Droit de la nature, mais sur quelques principes positifs, que les peuples Chrétiens de l'Europe, ont adoptés, comme des regles de leur conduite, les uns envers les autres. La religion, qui les a reduit depuis longtems, en une espèce de Société, le commerce reciproque, et la communication, dont il est l'origine, le grand nombre d'affaires de guerre et de paix, avenues entre eux, et les negotiations et traités, qui en ont été la suite; tout cela a insensiblement établi beaucoup de ces Regles, auxquelles le consentement tacite des nations a donné une autorité legale; et c'est de ce consentement tacite, que depend toute la validité et la force obligatoire, du Droit des gens Européen."

From our previous Inquiries in international law, it will be perceived, we concur generally in what is here laid down. But we do not consider the Droit des Gens Européen, as opposed to, but as recognizing

and carrying into effect, at least to a certain extent, the natural law of nations, and as establishing rules of national conduct, in indifferent cases, where that law does not absolutely prescribe, or, in its primitive state, at least, may not have clearly prescribed, a definite course of action. Neither do we think the *Droit des Gens Européen* owes all its validity and obligatory force to tacit consent. In so far as it recognizes and enforces the rules of the natural law of nations, it rests upon general principles, as legally valid and obligatory, as the principle, *pacta sunt servanda*, namely, that a nation which has consented to the adoption of a common rule of conduct, either expressly or tacitly, is bound to observe that rule.

§ V. "Le consentement tacite se manifeste, par les actions des hommes et des peuples. Il faut, donc, que ces actions soient d'une nature, à en pouvoir constater avec certitude, le consentement. Or nous pourrions le faire, avec assurance, si les actions sont souvent répétées d'une manière uniforme, et dans des cas semblables. De cette répétition fréquente, et uniforme, naît ce qu'on appelle usage ou coutume. Le *Droit des Gens Européen* est donc un assemblage de certains usages et coutumes, que les peuples, et les états de notre partie du monde, ont introduits entre eux."

In the doctrine here laid down, we agree, with the explanations before made; but must farther object to the use here made of the term, tacit. That term merely imports the absence of expression, by means of artificial signs, spoken or written, as opposed to express. Virtual consent seems to convey the idea more correctly and precisely.

§ VI. "L'existence de ce *Droit des Gens Européen*, est indubitable. Il y a beaucoup d'usages et de coutumes, que les nations de l'Europe observent entre

elles, tant en paix, qu' en guerre, et c' est par là, qu'elles se distinguent notablement des peuples barbares. Les Européens Chrétiens traitent leurs prisonniers de guerre, avec beaucoup de douceur. * * * Les Turcs et les Tartares en agissent tout autrement, de même que les peuples de l' Asie et de l' Afrique." The observation here seems quite correct.

§ VII. " Comme le Droit des Gens Européen n' est fondé, que sur des principes positifs, il est aisé de comprendre, que les nations pourront, s' il leur plait, les abroger, les changer, et y en substituer de nouveaux ; et c' est ce qu' elles ont actuellement fait, a l' égard de plusieurs anciens usages," &c. * * *

The doctrine here expounded is obviously introduced to support the author's theory and argument in favour of the new rules of Maritime international law, maintained by him to have been substituted for the old rules. Under certain limitations, the general observation is correct. It is true, as remarked by the author, that the European sovereigns have laid aside the formal declaration by heralds at arms, by which wars used formerly to be announced, and the oaths by which treaties used formerly to be confirmed. But such power of change does not hold absolutely, or universally. To effect it, the act of consent must be universal ; namely, that of all the nations individually, interested in, or affected by, the change. The power appears to exist chiefly in matters of form, like those just alluded to, or incidental matters, or matters of comparative indifference ; where no definite or decisive rule is prescribed by the juridical relations of states, by the natural constitution of civil societies, and the circumstances in which communities of men are placed with regard to each other.

§ VIII. " Ce n' est pas sur des loix écrites, mais seulement, sur des coutumes, que le Droit des Gens Euro-

péen, est fondé. Et comme selon les principes généraux, de la jurisprudence, une coutume n'est pas soutenue, par la présomption légale, celui, qui s'y rapporte, la doit prouver; en cas que la partie adverse n'en convienne pas. De la même manière, celui, qui allègue le Droit des Gens Européen dans un cas particulier, est obligé d'en prouver l'existence, si, dans ces cas, elle est niée par son adversaire.

IX. "La validité et la force obligatoire, du Droit des Gens Européen étant fondé sur le consentement des nations, celui, qui est dans le cas de la prouver, doit montrer, que les nations et les états de notre partie du monde, ont adoptés les mêmes principes, qu'il soutient, comme vrais; et qu'ils y ont conformément agi, et sans contradiction, de qui que ce soit, dans les cas, qu'il allègue, comme des preuves du Droit des Gens Européen."

In the doctrine here delivered, we acquiesce, with the exception, that the validity and obligatory force of the Droit des Gens Européen, does not solely rest on the consent of nations; especially when it recognizes and enforces the fundamental principles of the natural law of nations, equally self-evident, as that which holds a party bound by his consent expressed in a contract.

§ X. "On ne pourra, donc, pour prouver ce droit, étaler des cas, ou des faits, auxquels d'autres nations se sont ci-devant opposées, ou par des protestations, ou même les armes à la main; car il y manque une qualité essentielle, qui est le consentement."

It is quite true, that to prove the positive and practical law of nations, it is not sufficient to detail acts or proceedings which have been opposed by protests, or by the use of armed force. But this affords no reason for resorting solely and exclusively to treaties or conventions, as the only cases in which nations agree or adopt

uniform rules of conduct. There are numerous and various other cases besides treaties, in which nations, without any paction, adopt similar and even uniform rules of proceeding in relation to each other; thus so far recognizing and enforcing the natural law of nations, and thus so far establishing that law, if not always correctly for, at least against, themselves; inasmuch as their administration of the law of nations in their own favour, gives other nations a perfect right, if they choose, to exact from them, or to exercise against them, a similar, if not identical, administration of that law.

XI. "On a vu de tout tems, les nations Européennes engagées dans des querelles et des guerres, qui ont été à la fin, composées par des transactions, ou terminées par des traités de paix. C'est donc, ici, la question; si ces sortes d'instrumens publics sont propres à prouver le Droit des Gens Européen? Elle semble d'abord, devoir être décidée par le negative. Car ces traités n'étant faits, que par les parties, qui étoient en contestation, ou en guerre, ils ne pourront obliger que ces mêmes parties, et leur servir de preuves de leur droits, ou de leurs prétentions; mais il n'en peut naître ni obligation envers les autres, ni preuves du Droit des Gens Européen. Cependant, si des Princes ou des états, dans les traités, conclus, de tems en tems, entre eux, ont tellement adoptés de certains principes à l'égard de quelques affaires generales, qu'on n'en trouve le contraire établi dans aucun de ces instrumens, leur parfaite conformité prouvera un usage général, et par conséquent le Droit des Gens. Ainsi dans tous les traités de paix, on trouve la liberté des prisonniers de guerre stipulée de part, et d'autre. C'est donc une affaire décidée selon le Droit des Gens Européen.

XII. "Mais il y a des traités, où des principes très differens, sont adoptés dans une même affaire. Si donc

ces principes, sont tout à fait opposés, l'un a l'autre, le Droit des Gens en devient dubieux, et incertain. Cependant, comme dans les occurrences communes de la vie et des affaires, on considère, ce qui se fait le plus souvent et ordinairement, comme la règle; et ce qui n'arrive que rarement, et contre l'usage ordinaire, comme l'exception; un principe, qui est établi dans le plus grand nombre des traités, doit être regardé comme la règle; et celui, qui se trouve dans le plus petit nombre des conventions, comme l'exception. C'est, donc, selon le principe contenu dans le plus grand nombre des traités, que la dispute doit être décidée, et surtout, si le plus grand nombre de ces traités est de plus nouvelle date, et le plus petit nombre de plus ancienne. Car de cette circonstance on peut aussi inférer, que les peuples ont, peu à peu, abandonné un vieux principe, pour en adopter un nouveau; et que par ce changement des principes, ils ont pareillement changé le Droit des Gens."

The general reasoning here employed is very ingenious and plausible; and it may be due to the author to subjoin here, his subsequent application of it, in support of his theory, and of the cause he pleads, to the treaties of the European nations, relative to Maritime commerce during war.

CXI. "Depuis l'an 1646, jusqu'aujourd'hui, les puissances de l'Europe ont fait presque tous leurs traités de commerce selon ce nouveau principe. Dans un vaisseau neutre la cargaison est libre; et dans un vaisseau ennemi, elle est confiscable, comme la France, l'Espagne, l'Angleterre, le Portugal, le Danemarck, la Suède, le Roi de deux Siciles, les Provinces Unies, l'état de Gênes; et cela non seulement entre elles mêmes, mais aussi avec les états piratiques de l'Afrique; au lieu que l'ancien usage, de confisquer la cargaison de l'ennemi, dans un bâtiment neutre, et de relâcher la car-

gaison d'un neutre dans un bâtiment ennemi, n'a été conservé, que dans les traités, que l'Angleterre a fait en 1661, avec la Suede, et en 1670, avec le Danemarc.

CXII. "Il sembleroit, que le Droit des Gens Européen par rapport aux marchandises ennemies dans des vaisseaux neutres, et aux marchandises neutres dans des batimens ennemis, soit douteux, parce que les traités de commerce contiennent sur ce point des principes et des usages opposés et contradictoires. Mais, comme tous les nouveaux traités ont adopté le principe, que la cargaison des vaisseaux neutres est libre, et celle des vaisseaux ennemis, est confiscable, ceci doit être considéré comme la regle; et les deux anciens traités, où il est retenu l'ancien principe, suivant lequel des marchandises ennemies dans un vaisseau neutre sont confiscables, et des marchandises neutres dans un vaisseau ennemi, sont libres, ne sauroient faire, qu'une exception. Car il est evident, que les peuples de l'Europe ont, peu à peu, abandonné l'ancien usage en adoptant un nouveau, et, par consequent, changé leur Droit des Gens; ainsi, entre l'Angleterre et la Suede, et entre l'Angleterre et le Danemarc, l'ancien usage continue, par ce que les puissances l'ont retinu dans les traités susdits. Mais ces traités particuliers et uniques ne peuvent être allegués, comme des preuves du Droit des Gens Européen, parce qu'il a été changé, par le nouvel usage, établi, dans tous les nouveaux traités de commerce, dont il y a un si grand nombre. Cependant, si deux puissances n'en convenoient pas, c'est au Droit des Gens universel à en decider."

The arguments here urged are plausible; but upon more accurate investigation, it becomes manifest they are, in a great measure, unfounded in point of fact, and erroneous and inconclusive in point of law.

With regard to the matter of historical fact, we found,

in the previous chapters, that during the sixteenth and previous centuries, and also down to about the middle of the seventeenth century, with one exception in 1604, no treaties protected the property of the enemy, because it was on board a neutral vessel, or confiscated the property of a neutral, because it was on board a hostile vessel; that prior to the middle of the seventeenth century, the general practice of the European nations, was to seize the property of the enemy on the open seas, although carried by neutral vessels, and to respect the property of neutrals, although carried by hostile vessels; and that even after the various treaties, from about the middle of the seventeenth century, founded on by this author, were entered into, and in operation, the European nations continued, down to the middle of the eighteenth century, to observe the old consuetudinary rule just mentioned, in relation to all the other nations, with whom such special conventions had not been concluded. No nation appears to have adopted the first rule of the alleged new Maritime code of Europe, except by special treaty and counter stipulation. And no nation appears to have adopted the second, and very severe and unjust rule of that alleged code, (by which the goods of a friend or neutral were held to be confiscated, in consequence of their being conveyed in the vessel of an enemy), independently of such special treaty; except France and Spain; who continued that peculiar practice unilaterally, in regard to nations with whom they had no treaty, from 1543, down to about the middle of the eighteenth century.

With regard to this author's reasoning, in support of his inferential or conjectural *Droit des Gens Européen*, it does not appear to be very consistent with correct legal principle, such as is recognized in jurisprudence, or the internal private law of states, to hold that a num-

ber of individuals, by entering into similar contracts with each other, A with B, and C with D, and doing so on repeated occasions, or in succession, thereby become bound to fulfil the obligations undertaken by such contracts, not merely each to the parties with whom he has contracted, but likewise to all other parties who may have been in the habit of entering into similar contracts, or even to individuals who may never have entered into any similar contracts; or to maintain that an usage for a considerable time to contract, implies or infers an obligation to perform all the matters thereby undertaken, to all and sundry, in all time coming, without any renewal or extension of the contract. In bodies corporate, constituted by the internal law of states, in the progress of civil society, it is unavoidable that the minority should yield to the majority of members. But a majority of nations have no legal right, in virtue of that majority merely, to exercise any power over other independent states. What is most frequently done, is, no doubt, called the ordinary rule of practice, and what is less frequently done, the exception. But, even by the internal jurisprudence of states, although out of ten individuals in a community, eight may, for half a century, have, at successive periods, entered into similar contracts with each other, respecting their reciprocal conduct, so as to constitute an ordinary mode, or rule of action, such practice cannot give those eight individuals any right to compel the remaining two of the ten, to adopt their mode of contracting, although it be the more frequent, or ordinary mode, or legally prevent these other two individuals from adopting such mode of contracting as they may think fit, or from refraining from any paction at all, although this may be a deviation from, or an exception to, what may be the ordinary rule in the contracts entered into by the majority. And

when a practice, not merely of promising to act, but of actual performance, has been spontaneously, and without paction, adopted and followed for ages by nations, with reference to each other, and has thus come to be the rule observed by all having intercourse with each other, it seems manifest, that, even independently of such a practice being founded on the natural juridical relations of the communities of mankind, occupying separate portions of this globe, such a practice cannot, consistently with general legal principle, be changed, without the consent, by special convention or otherwise, of all the parties having such intercourse, who have observed the practice for ages, and are interested in its observance. The improvement in the mode of treating prisoners of war, became a part of the general European law of nations, not in virtue of any particular treaties among different powers, but by its foundation in the principles of the natural law of nations, and by its universal adoption in actual practice, by all the belligerent European states.

There is an obvious error, too, as formerly remarked, in this author supposing that the customs and usages of nations in relation to each other, can only be proved by conventions, or treaties among them. It was not till an advanced period in their civilization, that treaties, especially treaties with regard to maritime commerce, became at all frequent. And international practice, or the actual conduct of nations in such matters, in relation to each other, both before such treaties were entered into, and also afterwards, during the periods while these treaties were in existence and operation, distinctly appears, and may be proved by other documents, equally authentic as treaties, namely, the records of each nation's administration of Maritime international law, as contained in their legislative enactments or statutes, sove-

reign ordinances or reglemens, edicts or proclamations, and judicial determinations, as well as in the writings of their respective international jurists.

Another error of this author consists in supposing, that treaties afford complete evidence of the usages and customs, or actual practice of nations in relation to each other. Beyond the terms and limits of the treaties themselves, it is plain they can afford no evidence whatever; and even within these limits, treaties do not, like the enactments of the supreme power or judicial determinations of states, before mentioned, prove the actual conduct or practice of these states, in regard to others. The negotiation and conclusion of such treaties are, no doubt, the acts of the government of the nation; but the reciprocal stipulations in these treaties, do not afford evidence of the performance of the acts thereby stipulated. Many treaties, it is to be feared, have been entered into, without any bonâ fide intention of fulfilling them in terminis; and, at all events, a vast number of these treaties have de facto, remained unfulfilled in many particulars. And if, as appears from the other sources of historic evidence, before enumerated, the clauses in the later treaties referred to by this author, for the protection of hostile property on board neutral vessels, and the confiscation of neutral property on board hostile vessels, were in many instances mutually passed from, or agreed not to be observed, by the tacit consent or acquiescence of the contracting parties, no third party had any right to complain, and no injustice was done. Such treaties merely afford evidence of such and such engagements having been undertaken. A series, or succession of treaties, merely affords evidence of the usage of making such and such stipulations. And the only legitimate conclusion to be drawn from such a succession of treaties, containing similar stipulations, is

not, that the contracting parties intended thereby to establish, or believed they had thereby established, a rule of common or consuetudinary law, which was to exist independently of convention; but, that they believed no such common law existed, and, therefore, continued by such successive special bargains, to stipulate for, and undertake reciprocal obligations, which did not exist at common law, and could not be legally enforced, except by virtue of such special pacton.

Indeed, this author himself concludes with observing, that if two powers cannot agree, whether the old, or what he calls the new, rules of Maritime international law, shall be observed, the point must be decided by what he calls the universal law of nations; thereby admitting upon what an unstable basis his conventional Maritime law of Europe, derived or deduced by conjectural inference from treaties, is founded, beyond the mere stipulations in those treaties, affecting the contracting parties, while the conventions remain in force.

POTHIER.

About the same time with the anonymous work we have just been considering, in 1781, appeared the second edition of the "*Traité de Droit Civil et de Jurisprudence Française*," by Pothier; and as the views and doctrines of that eminent lawyer are not confined to the mere municipal practice and peculiar laws of France, it may be worth while to enquire, what he considered to be then the leading principles of Maritime International law. *Traité du Droit de Propriété.* § 86. "Outre le droit d'occupation, par lequel, nous acquerons le domaine des choses, qui n'appartiennent à personne, en nous en emparant, dont nous avons traité dans la section précédente il y a un autre espèce de droit d'occupation, qui est du Droit des Gens, par lequel un souverain, et

ceux, auxquels il communique son droit, acquièrent le domaine des choses, qu'ils prennent sur leurs ennemis, dans une guerre juste."

§ 92. "Comme il n'y a, que le souverain, qui ait le droit de faire la guerre, aucun particulier n'a droit, d'armer un vaisseau de guerre, pour faire la course, sur les vaisseaux ennemis, sans y être autorisé par le Roi."

§ 95. "Tous les vaisseaux appartenans à l'ennemi, soit qu'ils soient armés en guerre, soit qu'ils soient, vaisseaux marchands, peuvent être pris légitimement, suivant les loix de la guerre, soit par les officiers de la Marine du roi, soit par les Armateurs Corsaires, qui ont commission du Roi."

§ 96. "Non seulement le navire ennemi, qui a été pris, est de bonne prise; toutes les marchandises et tous les effets, qui se sont trouvés sur le navire, sont pareillement de bonne prise. Cela ne pouvoit guère souffrir de difficulté, à l'égard des marchandises des sujets du Roi; en chargeant des marchandises sur les vaisseaux ennemis, ils contreviennent à la loi, qui leur interdit tout commerce avec l'ennemi; et ils méritent, par leur contravention, de perdre leurs marchandises. Il auroit pu paroître plus de difficulté, à l'égard des marchandises des sujets, des Puissances alliées; néanmoins elles sont aussi déclarées de bonne prise. La raison est, que ceux, qui chargent leurs marchandises sur des vaisseaux ennemis, favorisent le commerce de l'ennemi, et qu'en les y chargeant, ils sont censés s'être soumis à suivre le sort du vaisseau, sur lequel, ils les ont chargées."

§ 97. "Un vaisseau François qui a été pris par l'ennemi, et a été plus que vingt-quatre heures, en sa possession, est censé appartenir, avec toute sa cargaison, à l'ennemi, qui en a acquis le domaine, par le Droit des Gens, et les Loix de la guerre. C'est pourquoi, lorsque ce vaisseau est repris par un Armateur Fran-

çois, il est de bonne prise, aussi-bien que tout ce qui est dedans."

§ 102. "Non seulement, les vaisseaux, qui appartiennent à l'ennemi, mais ceux, qui sont chargés de marchandises appartenantes à l'ennemi, sont pareillement de bonne prise. La disposition de cette article est très juste, à l'égard des navires, qui appartiennent à des François. Le François en chargeant sur son vaisseau, des marchandises des ennemis, contrevient ouvertement, à la loi, par laquelle le roi interdit à ses sujets tout commerce avec l'ennemi; et il merite, pour cette contravention, la peine portée, par cette article, qui declare de bonne prise le navire, chargé d'effets, appartenans à l'ennemi. Mais lorsque le navire appartient au sujet d'une puissance neutre, il sembleroit, qu'il ne devroit y avoir, que les marchandises de l'ennemi, qui s'y sont trouvées, que devroient être de bonne prise; il est bien dur, que le navire où elles se sont trouvées, soit aussi de bonne prise. Quelque dur, que cela soit, il n'est pas douteux, que sous la généralité de ces termes de l'art. 7, "Tous navires," les navires des puissances neutres, sont compris, et que par cet article, ils sont de bonne prise, lorsqu'ils se trouvent chargés d'effets, appartenans aux ennemis. Le reglement du 23, Juillet 1704, le dit même, en termes formels. On apporte pour raison de ce droit, que, si les vaisseaux neutres, lorsqu'ils sont chargés des effets de l'ennemi, ne sont pas choses proprement appartenantes à l'ennemi, elles sont, du moins, choses au service de l'ennemi, et que c'est une espèce de contravention à la neutralité, que d'être en leur service. Il a été, enfin, dans les dernières guerres, derogé à ce droit rigoureux, à l'égard des sujets des Puissances neutres; et il a été ordonné, par l'art. 5, du reglement du 21 Oct. 1744, que lorsqu'on trouveroit dans les navires des sujets des Puissances neutres, des effets appartenans

à l'ennemi, il n'y auroit, que ces effets, qui seroient de bonne prise, et que le navire neutre seroit relaché." Here, Pothier, like himself, candidly disapproves of the former practice of his country, and seems glad to notice the recent adoption by his government, of the rule which is not only less rigorous, but more consistent with legal principle, and which had been observed by the Maritime states of the Mediterranean, from the ages which preceded the compilation of the *Consolato del Mare*, and also, subsequently, by England and Holland.

§ 104. "Il ne faut pas confondre, avec les marchandises de l'ennemi, celles qui appartiennent à un particulier, sujet d'une Puissance neutre, qui les porte, à l'ennemi, pour trafiquer avec lui. Il n'a jamais été permis, d'apporter aucun trouble aux sujets des Puissances neutres, par rapport aux dites marchandises. Il faut, néanmoins excepter certaines espèces de choses, qu'on appelle effets de contrebande, qu'il ne pas permis aux sujets des Puissances neutres de porter à l'ennemi, et qui sont de bonne prise, quelque soit le vaisseau, sur lequel elles sont chargées. Ce sont * * * les armes, poudres, boulets, et autres munitions de guerre, même les chevaux et équipages, qui seront transportés pour le service de nos ennemis, en quelque vaisseau qu'ils se soient trouvés, et à quelque personne qu'ils appartiennent. A l'égard des munitions de bouche, que des sujets des Puissances neutres envoient à nos ennemis, elles ne sont point censées de contrebande, ni par conséquent sujettes à confiscation, sauf dans un seul cas, qui est, lorsqu'elles sont envoyées à une place assiégée ou bloquée."

BOUCHAUD.

About the same time, also, there appeared at Paris, in 1777, the "*Théorie des Traités du Commerce entre*

les nations," by M. Bouchaud, Professeur Royal du Droit de la Nature et des Gens. This work exhibits great learning; but it is more perhaps to be remarked on that account, than for acuteness of observation and extent of view. It is more occupied, too, with the doctrines of political economy and finance, duties on imports and exports, &c., than with those of Maritime international law during war. The latter, however, are also treated incidentally; and these parts of the work may be shortly noticed, as showing the views then entertained in France, with regard to the just administration of that branch of the law. These doctrines are considered by Bouchaud, chiefly in the character of restraints upon the natural liberty of commerce, as affecting persons, and then as affecting things.

Thus, with regard to persons, he lays down the following doctrine in chap. IX. § 1, "Qu' il n' est point permis aux sujets d' un Etat, de traffiquer avec l' ennemi." And while, in § 2, he enquires whether "La prohibition de traffiquer avec l' ennemi se borne-t-elle, aux sujets de l' etat, ou peut elle s'etendre aux nations amis, et aux puissances neutres?" he concludes thus, p. 277, "Si l' on est obligé de convenir, que ceux, qui, liés avec notre ennemi par un traité, lui envoient des troupes auxiliaires, ne fait qu' user leur droit, on ne peut nier de même, qu' il ne nous soit permis d' opposer nos armes aux leurs. Par la même raison, une nation belligerante est en droit d' empêcher le commerce avec son ennemi, s' il en resulte pour l' ennemi, quelque augmentation de forces, ou si sa propre defense en devient plus difficile. Or, qui peut nier, que les vivres, de l' argent, des vaisseaux, et tout ce que sert à leur équipement, ne contribuent pas moins, à augmenter les forces de l' ennemi, que si on lui fournissoit des armes. Rien, n' est donc plus juste, que de pouvoir intercepter toutes ces choses,

lorsqu' elles sont portées à notre ennemi ; c'est le sentiment de Zouchaeus, de Selden, de Hertius, et de beaucoup d'autres publicistes." Farther, while he states, in § IV, "Qu' une nation qui n' est point en guerre, ne peut empêcher une nation libre et indépendante, de traffiquer avec une troisième," he at the same time admits, in § III, "Qu' il nous est permis, de traverser le commerce, que fait notre ennemi, avec une nation qui nous est amie, pourvu que nous ne violions pas le territoire de cette nation."

With regard again to things, assuming that articles contraband of war, although belonging to neutrals, are, of course, liable to confiscation, he farther admits, "Que l' usage de confisquer, avec les marchandises de contrebande, les vaisseaux qui les portent, soit fort ancien, et s' observe encore aujourd' hui, très fréquemment, entre les nations de l' Europe;" subjoining instances, however, in which different nations have entered into contrary conventions; and justly adding, in § II, "Que l' on ne doit pas confisquer avec les marchandises de contrebande, celles, qui ne sont pas prohibées." In § III, he states the practice, when there are found on board neutral vessels, goods belonging to the enemy; and admits that the Ordonnance of Francis I. bore, that the vessels of a neutral nation, loaded with goods belonging to the enemy, and hostile vessels loaded with goods belonging to friends or neutrals, should equally be good prize. But he omits to notice the much later and more celebrated Ordonnance of Louis XIV, to the same effect, and more precise in its terms, which was still in force in France, when Valin wrote; and, apparently ashamed of his country having persevered in this rigorous practice, contrary to the general practice, which had prevailed from the ages preceding the *Consolato del Mare*, he goes on to notice treaties, by which France

had departed from this peculiar unjust practice, and then gives the following as his own opinion. "Les choses nous semblent devoir se décider un peu différemment, si ce sont des marchandises appartenantes à des amis, que l'on trouve sur des vaisseaux ennemis. Dans ce cas, on ne voit point de raison, qui autorise la confiscation de ces marchandises, conjointement avec celle du navire, au profit de ceux, qui on fait le coup de main. Ce ne peut être à cause de la qualité des propriétaires de ces marchandises, puisqu'ils ne sont pas regardés comme ennemis; ce ne peut être à cause de quelque délit, car quel mal y a-t-il de mettre des marchandises sur le vaisseau d'une nation, en guerre avec une autre nation. Enfin, ce ne peut être à cause de la qualité des marchandises; puisque nous les supposons n'être prohibées par aucune loi, par aucune notification." He goes on, also, with great justice, to give his farther opinion. "Nous pensons qu'il en faut dire autant, si, sur des vaisseaux amis, on trouve des effets appartenans à l'ennemi. Qui peut douter, que ces effets ne soient de bonne prise, puisque tout est permis à un ennemi, par rapport aux choses, qu'appartiennent à son ennemi, et qu'il est en droit de s'en emparer, partout, où il les trouve, mais ce n'est pas une raison, pour, qu'il nous soit permis, dans ce cas là, de confisquer des vaisseaux amis, et rien ne nous y autorise. * * * De même, que ceux, qui enlèvent de dessus ces navires, les effets de leurs ennemis, usent de leur droit, de même, ceux qui transportent sur leurs vaisseaux, les effets de leurs amis, ne font tort à qui que ce soit." p. 367—8. And here it will be remarked, that, while contrary to the second branch of the pretended new Maritime international law of Europe, he maintains, agreeably to the previous general practice, and that of England and Holland, that the property of neutrals, although found

on board hostile vessels, ought to be respected; he has no doubt whatever, that the goods of the enemy, although on board neutral vessels, are good prize.

GALIANI.

In reviewing the anonymous works which appeared in 1780 and 1782, entitled, "*La Liberté de la Navigation et du Commerce*," and "*Essai sur un Code Maritime general Européen*," ascribed by Von Kamptz to Professor Cobald Totze, we found that the principles on which the system of armed neutrality, patronised by the Russian Empress Catherine, was founded, were thereby ably supported and illustrated in Holland and Germany. And in 1782, we find the Abbate Galiani, Sicilian Secretary of Legation at Paris, was employed to illuminate the south of Europe also, on this subject; and produced an ingenious work, entitled, "*Dei Doveri dei Principi Neutrali verso i Principi guerreggianti, e di questi verso i Neutrali*."

After laying down some juridical definitions and axioms, and giving an account of some general theories of human obligation, Galiani enquires, whether, and in what cases, a sovereign may remain in a state of neutrality, and whether his doing so, can, in any case, afford just ground for war against him. He next considers treaties of neutrality; then passes to the more interesting subject of the essential duties of neutrality. After discussing the ordinary territorial rights and obligations of neutrals, he proceeds to treat of commerce between neutrals and belligerents, of the interception of that commerce with hostile nations, total, as with a besieged city, or blockaded port, and partial, as with regard to articles contraband of war. What articles are contraband of war, he investigates at some length, and what the extent of the right competent to belligerents

over the trade of neutrals in such articles. And he then inquires who is the competent judge in the arrest or stoppage and detention of neutral vessels, and in the capture of such vessels as prizes. His last chapter, he devotes to the actual usages of the sea, between belligerents and neutrals, and treats of the dissimilarity between warfare by land, and warfare by sea, and the consequent diversity in the rights of parties; of privateering expeditions; of the shelter or reception given by neutrals to the ships of war, and privateers of the belligerent nations; of the right to asylum and protection competent to the armed vessels of the belligerents in the ports, and on the coasts of neutral nations; of embargo; of visitation and search; of the arrest or detention of neutral vessels, met with in the open sea; and of the violations of right sometimes practised on such occasions, on the part of belligerent vessels; of captured vessels and cargoes, and of their confiscation as prize.

In his concluding chapter, Galiani gives a brief, but pretty distinct account of Maritime international law, as previously recognized in the practice of the European states, independently of particular treaties. But he himself states, "*Un irresistibile Commando ha prodotto quest' opera.*" And as he was thus confessedly employed as an advocate for the unconstrained freedom of neutral trade during war, he is, of course, a great admirer of Hübner, although he differs from him in some things. Indeed, in the preceding and largest portion of his work, before referred to, consisting of nine chapters, he seems to have embarked almost without a compass, on the wide sea of general principle; and inquires rather what Maritime international law ought to be, than what it had been, or was at the time he wrote. In his great zeal to support the almost unlimited freedom of neutral

traffic during war, he becomes eloquent, paints in glowing colours, and gives rather an exaggerated representation of the hardships and distresses inflicted, not only on the crews of neutral merchant vessels, but also on neutral merchants and their families, by the seizure in the open sea of these vessels and their cargoes, on the ground of carrying contraband goods, or the goods of the enemy; forgetful altogether of the evils which would arise from the general adoption of the rules for which he contends, particularly in the indefinite protraction of the duration of wars, and the indefinite hardship and obstruction it would occasion to the one or other of the belligerents, in the prosecution of their just rights, by means of war.

On the other hand, while he disputes the absolute right of belligerents to prohibit the trade of neutrals in articles contraband of war, Galiani admits that in true and sincere impartiality, it is the duty of neutrals, when requested, to abstain from traffic in such articles with the enemy. And of this rule of the natural law of nations, against neutrals carrying goods contraband of war to the enemy, he admits as a necessary consequence, the right of visitation and stoppage, as being indispensable for the detection of such illegal goods. “Una nave neutrale carica di munizioni da guerra, o di viveri verso un luogo assediato, se è incontrata in mare aperto, solo coll’arrestarla si può aver certezza, che non prosiegua il suo cammino. Sicchè l’arrestar navi con contrabando, non è violazione della bandiera, non è ingiuria fatta al Sovrano di quella.” But he rather inconsistently adds, “Ma il riguardarle poi come preda, il voler giudicarne la legittimità, il confiscarle è violazione dell’ altrui dritto Sovrano; è offesa della neutralità e dell’ amicizia.” p. 389.

Farther, in treating, in his last chapter, of the actual

usages of the sea, in other words, of the positive Maritime international law of the European states, Galiani lays down the following doctrine relative to the right of visitation, stoppage, or arrest and search of vessels navigating the open sea. "Delle visite potrà esser breve il discorso, dacchè scorgesi già pervenuta l'Europa a fissarne la teoria del vero dritto, ed i piu celebri moderni Trattati l'hanno adottata; laonde, se nella pratica qualche popolo se ne discosta, non proverrà da ignoranza, ma da mala volontà.

"La voce uniforme, e costante de' Trattati mi avrebbe forse anche persuaso a trapassar in tutto sotto silenzio, le leggi delle visite in mare aperto, se io non vedessi il saggio, ed accurato Ubner nel lungo discorso, che ne fè, esser non so come, caduto, in molti e gravi abbagli; e potendo la di lui autorità indurre altri in errore, mi convien trattenermi un poco a raddrizzarne le idee.

"Richiamerò alla mente de' lettori, quelle differenze fisiche, che io dissi corrervi tral mare, e la terra, dalle quali si ravvisa provvenir anche quest'altra differenza; che, chiunque viaggia per terra, sà con certezza, quali siano i borghi, le torri, gli edifizj, che scuopre, e a chi ne sian sudditi gli abitatori; anzi mediante la scienza geografica sà anche anticipatamente quelli, che anderà ad incontrare; ma sul mare, è impossibile assicurarsi di qual nazione sia una nave, se ella sia mercantile, o pur da guerra, e di chè sia carica, qualor non si vada, non solo, a riconoscerla da vicino, ma a visitarla.

"Questa visita altro non è, che il chiamare con qualche segnale, o di tromba, o di sparo di cannone, un bastimento, acciocchè si accosti, e si trattenga, finchè si mandi una lancia, a veder le sue carte di mare. Talune di queste servono a dimostrar convincentemente la nazione, a cui è suddita la nave; altre dimostrano la qualita, e la spettanza della mercanzia. Or poichè non

può sempre, chi naviga rimaner tranquillo nel dubbio, e nell' ignoranza della condizione de' bastimenti, che vede girarglisi intorno, chi può negarmi d' esservi in lui, natural dritto di esigerne la conoscenza? Non è dunque atto di superiorità, nè di giurisdizione, la visita; egli è solo un dritto di natural difesa, e precauzione. Non appartiene ai soli legni armati; non riguarda il solo stato di guerra; è universale, è reciproco tra tutti, ed in ogni tempo. (1.) La semplice visita non essendo, nè potendo esser, atto di giurisdizione, dapoicchè, egli è un dritto reciproco, ed eguale, nè potendosi supporre dominio del mare aperto e libero," &c. p. 457, 458, 459, 460, 461.

While, however, he thus recognizes the right of visitation generally, in peace, as well as war, and also the right of search, for the purpose of ascertaining whether neutral vessels have on board warlike stores, or even grain and other provisions, destined to a blockaded port, Galiani, as the advocate for the, in other respects, unlimited freedom of neutral trade, denies the liability of hostile goods on board neutral vessels to seizure at sea; and, of course, denies also, the consequent right of search, for the ascertainment of the ownership of such goods. But, in point of legal principle, he does not, like Hübner, found this pretended right of neutrals to protect from seizure, the property of the enemy, on the absurd position of a small merchant vessel in the midst of the Atlantic, Indian, or Pacific oceans, being a part of the territory of a neutral European state, of Holland for instance, or Denmark, or Sweden. Nor does he, in support of the maxim, that the neutral flag protects the hostile cargo, like some recent jurists, such as Martens and Klüber, attempt not merely to collect treaties, and to arrange the particular stipulations and obligations thereby agreed on, or undertaken by the contracting

parties, into classes, according to the points or subjects common to certain portions of them, which constitute the system of the particular conventional international law of Europe, of fixed or temporary, or of indefinite, and so far doubtful duration, but also to extract from these treaties, a sort of general consuetudinary law of nations, binding not only upon the contracting parties, and to the extent of the obligations undertaken by them respectively, but binding upon all these contracting parties, in favour of other nations, with whom they have not contracted, and not for a temporary or indefinite, but for a permanent or perpetual duration. He seems to support the maxim for which he contends, partly on the plea of the sovereign of the neutral state, to which the captured vessel belongs, being the only competent judge in the matter of prize, partly by an appeal to the morality of nations, to those higher principles and feelings of human nature, the observance and cultivation of which, it is admitted on almost all hands, are the moral duty of all nations, as well as individuals, and would preclude all wars and the hardships thence resulting, because no injury or damage would be done by nation to nation, and there would be no occasion for any forcible demand of restitution or reparation. In prosecution of this view, he labours to discover, and thinks he has succeeded in pointing out various errors, if not inconsistencies and absurdities, in the writings of all, or almost all the international jurists, from Grotius to Vattel, inclusive, in their doctrines of the rights and obligations of neutral states in relation to belligerent nations. And he believes he has discovered the origin and cause of these errors and inconsistencies, in their having set out with assigning to belligerent states, too large and extensive powers in the shape of rights of war. See p. 288, to p. 293. But while it is unquestionably highly laud-

able to inculcate, and to endeavour, by advice and persuasion, to induce the rulers of nations, to practise towards each other the *praecepta virtutum*, and to discharge the reciprocal moral duties of friendship and beneficence, which communities, as well as individuals owe to each other, it does not appear from experience, that, in the present still very imperfect state of human nature, the legal or juridical compulsory rules for the regulation of the intercourse of nations, can be rested on such a basis, or can be practically extended and enforced beyond the chiefly negative duties of justice, such as *neminem laedere*, *suum cuique tribuere*, *pacta servare*, *lucrum non captare alienâ jacturâ*, *seu cum damno alterius*. Amidst the various collisions of the interests, real or supposed, of states and individuals in the commercial intercourse of nations, it seems vain, along with St. Pierre and Kant, to indulge in, or proceed upon the dream, however delightful, of perpetual peace. And in endeavouring to discover, or establish the rules of compulsory justice or law, which regulate, or ought to regulate, the conduct of independent states, we must proceed upon the too probable supposition of wars, not merely aggressive, and so far unjust, but of wars undertaken for the preservation of important national and individual interests, or the enforcement of valuable claims, and which last must be held just on both sides, inasmuch as both parties may believe themselves to be in the right, and act *bonâ fide*.

The humane views taken by Galiani in the passages before referred to, are ingenious, and well deserving the attention of all governments, as tending to diminish the evils consequent upon all wars; but these views are, at the same time, in a great measure unilateral, in favour of neutrals, and it is just and necessary to consider also, the effect of the rules which it is thus attempted to es-

tablish upon those nations who are obliged to go to war for the preservation of their existence and comforts, as a nation, or to obtain reparation for injuries inflicted through the aggressive conduct of other states.

When he comes, in his last chapter, to treat of what he calls the actual usages of the sea, or the positive Maritime international law, observed in the practice of the European states, Galiani does not deny the fact, that except when it was stipulated otherwise, by special treaty, the goods of the enemy were, for a series of centuries, held in practice to be liable to seizure as prize, when found on the open sea, although on board neutral vessels. But he dismisses the matter by a reference to his vague reasoning, before referred to, and by giving an historical narrative of the following import, assumed as fact, without any evidence: that originally, or in early times, but when, does not distinctly appear, the Maritime cities which arose on the coasts of the Mediterranean, the North sea, and the Baltic, enjoyed the full immunity of their mercantile flag; but, that from various causes, and particularly from the great European governments becoming envious of the riches acquired by these trading states, through their peaceful industry, and therefore inclined to view them as enemies, their flag ceased to be any longer respected, and harsher usages came to be adopted; that prisoners, indeed, were released, because, as christians, the captors could not reduce them into slavery, and their maintenance was attended with expense, but avarice was stimulated and gratified by the seizure of rich and costly merchandise, as prize; that these more rigorous usages were, unfortunately, collected in a book, called the *Consolato del Mare*, which the rudeness and infelicity of the age suddenly converted into a Code of law, without its ever having received the intrinsic force of authority, except through a natural

good sense of equity, which shines through many of these customs; and that thus the violation of friendly and independent flags came to be regarded as the Law of the sea. But, although this may be a plausible story, it is manifestly got up by an ingenious advocate, in order to support the neutral pretensions of later times; and it is not only unsupported by evidence, but contradicted by evidence, by the collection of usages alluded to, of which, as we have shown elsewhere, the history has recently been so accurately traced by Capmany and Pardessus, and which, *ex facie*, are obviously the usages adopted spontaneously by the trading maritime cities of the Mediterranean themselves, not forcibly imposed on them by the governments of the greater nations of Europe. The story, too, is contradicted, not only by the writings of the series of International jurists, whom we have noticed in succession, but also by the statutes, ordinances, and judicial determinations of the different maritime states, great and small, and by the various subsequent treaties, specially stipulating, as a concession, for what is alleged to have formed part of the original, or earliest consuetudinary International Maritime law of Europe.

PEACE OF 1783, ABANDONMENT OF THE ARMED NEUTRALITY.

Upon the recognition by Great Britain, of the independence of her American colonies, who had revolted, as a separate state, and upon the conclusion of the peace of 1783, between Great Britain and the other European states, who had taken advantage of the struggle in which she was involved with these colonies, the celebrated Northern confederacy, called the armed neutrality, if not formally dissolved, ceased to excite the same interest. France and Spain ceased to observe it, even during the continuance of the war; and, as we shall afterwards see,

even Russia, the great originator of the system, by subsequent treaty with Great Britain, abandoned it.

SECTION II.

IN the interval which elapsed between the peace of 1783, and the commencement of the war of 1793, some other valuable works appeared, on Maritime international law, of which it will be proper to take notice.

HENNINGS.

In 1784, the Danish councillor of state and commercial intendant, Hennings, edited a collection of the state papers, which, during the maritime war, from 1776 to 1783, the different belligerent and neutral powers had promulgated, relative to the freedom of trade and navigation; "Sammlung von Staatsschriften, die während des See-krieges von 1776, bis 1783, sowohl von der Kriegsführenden, als auch von der Neutralen Mächten, öffentlich bekannt gemacht werden sind, in so weit solche der Freiheit des Handels und der Schifffahrt betroffen." Along with this collection, Hennings also published, "Un Abhandlung über die Neutralität und ihre Rechte, insonderheit bey einem See-Kriege." In this treatise he adopts the views of Hübner, and labours to prove that the maxim, "free ship, free goods," is founded not only on treaty and convention, but also on the principles of the general established law of nations, and on the interests of the belligerent powers themselves.

PESTEL.

About this time, (1786—1789), the younger Pestel published at Leyden, his *Selecta Capita Juris Gentium Maritimi*. In this short, but able work, Pestel treats of

the freedom of the sea, of the navigation of neutrals as impeded or interrupted in time of war, of contraband of war, of blockade, and of the goods of the enemy found in the vessels of neutrals. And with regard to the last subject, while he states the differences in the opinions and practice of different nations, as appearing from the writings of their jurists, and the treaties into which they have entered with each other, during the 17th and 18th centuries, he evidently disapproves of that rule of what is now called by some the new system of Maritime international law, by which the hostile vessel is held to confiscate the neutral cargo; and concurring with Grotius and Vattel, he disapproves also of the other rule of that system, by which a neutral flag is held to protect the goods of the enemy. After noticing the old rule of France, "*que la robe ennemie confisque celle de l'ami*," and referring to the particular treaties with Holland, from 1662 to 1730, by which the French government agreed to depart from its established rule with other nations, he proceeds as follows: "*Quod transvectionis rerum hostilium liberae praesidium, nuper confirmatum est pluvium populorum conventionem, quae nomine 'Quietis Armatae' appellari consuevit. Perspicuum est, quam haec lex libertati amica, sit utilis illis Principibus, qui, quod minus, quam alii, virium naaritimaram habent, aliena, mercium suarum subvectione, vel ex finibus externorum, vel ex portibus suis aliis ad alios, indigent; quamque illis prosit, qui ex eâ vecturâ, quaestum faciunt. De qua regulâ, uti a Gallis dissentiunt Britanni, ita de eo quoque, quod illi merces, exorto bello, navi hostili impositas ab antiquo sine exceptione, publicare solent, Britanni nisi foedera abstinent, non ex rebus naves, non ex navibus res, quae belli jure, capi possint, aestimari debere; sed res hostiles in navi amici, deprehensas capi posse censent, res amici in navi hostili non posse.*"

Quorum illud putant niti, jure rem hostis capiendi, et mercaturam ejus maritimam ubique affligendi, quod jus evertere, hostis negotia agere, lucrum augere, damnum in legitimâ juris sui persecutione, illum impediendo, dare, non deceat pacatum; hunc vero res suas navi hostili committentem, hoc facto nihil hostile moliri, sed libertate naturali uti; proinde dominio suo privari non posse; non jure defensionis, quia neminem aggrediatur; nec jure poenae exigendae, quia non delinquat." § XII. p. 42, 43.

LAMPREDI.

But of all the works on the reciprocal rights and obligations of belligerents and neutrals, which appeared during the period we are surveying, from 1776 to 1793, the most valuable, in point of fairness of view and impartiality, is that of Lampredi, Professor of Public Law in the University of Pisa, published in 1788, and entitled, *Del Commercio dei Popoli Neutrali in tempo di Guerra*, Trattato. Professor Lampredi had, in 1782, published in three vols. octavo, his excellent work, entitled, *Juris Publici universalis, sive Juris naturae et Gentium, Theoremata*; and in the treatise before mentioned, he followed out his general principles, in their application to the department of Maritime international law. He appears to have been more free from the influence of national bias, than most of the international jurists; he was not employed as an advocate to plead the cause either of belligerents or neutrals; and he does not appear to have had any of that individually selfish, or narrow minded patriotic interest, in the questions discussed, which has sometimes quickened the perception, at other times, dimmed the vision of jurists, born in, or belonging to, such commercial states, as generally manage to remain at peace, while the other, and larger

states, are sometimes necessarily, sometimes without adequate cause, engaged in warfare. For these reasons, we think it will be proper to give a full analysis, or abridgement, of this treatise, as being free, at all events, from any British national bias. And before doing so, we have only to remark, that by the conventional law of Europe, Lampredi appears to have understood, in general, conventional law, strictly so called, as composed of the particular treaties entered into among nations; but at times also, what we have denominated the common consuetudinary law of nations, as recognized in their common customs and usages, and reciprocal conduct to each other in their mutual intercourse.

So far as particular treaties or conventions extend and endure, and so far as a systematic arrangement is made, of the common and usual provisions in these treaties, a body of conventional law is, of course, formed, which is clearly obligatory on the contracting parties, to the extent, and for the duration of the mutual bargains thus made by them; which, of course, supersede any recurrence to other principles for the regulation of their conduct in such matters. But beyond this, such a conventional written code, has no legal force. And instead of attempting to compile a complex code of international law, out of such special and particular, temporary and transient materials, a more rational course of proceeding would be, to ascertain from their internal statutes and ordinances, and from the records of the determinations of their judicial tribunals, what has been the particular administration of international law observed by each state towards others; and to hold it bound, on the incontestible principle of reciprocity, to submit in its turn, to such treatment as it has made other states experience, at its hands.

As the necessity, or urgent expediency of commerce,

or the mutual exchange of commodities, natural and artificial, obviously arises from the physical constitution and wants of mankind, and from their being dispersed over, and inhabiting, different portions of the earth, only physically productive of certain different commodities, requisite for human subsistence, convenience, and enjoyment, and from the different degrees of civilization or progress in art and science, attained by the different assemblages of men, congregated into separate nations, and occupying separate portions of this globe, there is no occasion to inquire into the soundness of Lampredi's distinction in § I, and § II, of the right of commerce, as being a perfect right, or a right admitting of compulsory enforcement in genere, though not in specie. In extreme cases of necessity, a nation may be held justified in seizing for subsistence, commodities belonging to another, under certain provisions and limitations. But in support of the right of Maritime commerce, it seems sufficient to propound a general maxim, admitted on all hands, that each nation in peace, is entitled to trade with any other nation, which chooses to do so, without being interrupted therein by any third nation. All human rights, however, whether of individuals living in civil society, or of nations, appear to have boundaries, and to be subject to limitations. And the question here is, whether the state of war between two nations affects, or ought to affect, the right of commerce just described, as existing among nations living at peace, and to limit that right, at least to a certain extent.

It may be difficult, observes Lampredi, in § III, to find, by simple natural reason, any foundation for this alleged limitation in the general law of nations. The event of two nations forcibly attacking each other, whether justly or unjustly, whether in defence, or in vindication of an alleged right, does not, (it has been

argued), affect the state of other peaceful nations, who take no part in the controversy; it can have no influence upon their natural liberty and independence; and as their state does not thereby undergo any change, the exercise of their natural rights, among which is commerce, ought not to suffer any change. This event may suspend the offices of humanity, and the efficacy of natural law between the belligerents, but cannot, in any way, suspend it with regard to all other nations at peace, who, while the combatants carry on the contest, and look for the decision of the controversy to victory, may regard with tranquillity their state of violence, and prosecute with each the commerce which they carried on before the war. In fact, for them, it is argued, there is no war. The belligerents are their friends, and conduct themselves towards them as towards other nations, who are in full peace. And provided the conduct of the nations remaining at peace, is entirely impartial in time of war, their commerce, whatever it may be, cannot be interrupted without injustice. The only law which neutrals are obliged to observe towards belligerent nations, is perfect impartiality, as well in the performance of the offices of humanity, as in the exercise of their commerce. This is the only limitation which their right of natural liberty and independence suffers, through the occurrence of war among other nations.

But the favour or preference which a people might, in time of peace, show to one of two nations, rather than to the other, whether from good will or caprice, ceases immediately, when these two nations become enemies, and declare open war against each other; at least if that people wishes not to take a part in the war, and declares its resolution to remain neutral.

This principle, says Lampredi, has been clearly expounded by some writers, as by Bynkershoek, *Jur. Pub.*

Lib. I. c. 9, and by Christian Wolff, Jur. Gen. cap. VI. § 683. But confounding one question with another, as we shall soon see, they have not deduced from the principle, those consequences, which might remove the confusion that obscures the subject.

Opposed, however, to this right which neutral nations have to carry on their commerce with impartiality, continues Lampredi, in § IV. there are clear and evident rights, which belong to the nations who are actually at war, and which seem entirely destructive of the right we have been considering. The one enemy has a perfect right to diminish indefinitely the strength of the other, and to prevent every measure by which that strength might be augmented or preserved. It must, therefore, have also the right to prevent a nation from carrying on with its enemy, a commerce which may render it stronger in war, or more fit and able for defence or offence, or which may render ineffectual, military operations, which, if not prevented, might probably have led to victory, and the restoration of peace. It thus appears there are two questions very different, and which cannot be decided by the same principles. What are the rights of neutrals with regard to commerce with nations at war? What are the rights of nations at war, with regard to the commerce of neutrals, with their respective enemy? These two questions, says Lampredi, in examining which, we may come to conclusions directly opposite, and yet true, have not been well distinguished; and from the neglect of this distinction, has arisen the confusion which exists on the subject.

In this place, continues Lampredi, I merely slightly touch the first question, so far as may be sufficient for the order and clearness of the ideas; being to treat of it of new, under the question to be proposed, "whether the neutral flag covers and saves the goods of the enemy," and

directing attention at present, to the right of belligerents over the commerce of neutrals, it appears to me pretty clear, that the necessity of defence cannot give any other right, than to prevent in some cases, the neutral from transporting or conveying his commodities to the enemy, and to take all the precautions which he shall believe necessary, to secure himself, that neither then nor afterwards, shall such commodities be introduced into the hostile territory; and if for this security, he should believe the arrest or seizure of the vessel necessary, it appears to me, he may justly retain and keep the vessel in custody; making reparation, however, for the loss or damage which such detention may occasion, without ever proceeding to confiscation, to which the extreme necessity, which is in substance, the foundation of his right, can never force him.

But it is not of importance, continues Lampredi, to pause long, to ascertain the rule of justice in this case. Every one sees that the claim of right of belligerents might encrease extremely, to the loss and damage of neutrals, as often as it took its origin from the necessity of defence, and the belligerent was himself the judge of that necessity; he might either maliciously, or even innocently, and from mere error of intellect, believe it necessary, to prevent not only the transportation of arms and of provisions, but of many other kinds of merchandise, and thus reduce to difficulties and misery, the neutral nations, or drag them into calamitous war; there being on earth no judge of his erroneous judgments.

When they had turned their attention to navigation and commerce, and had begun to regard them as inexhaustible sources of riches and power, the more civilized nations of Europe appear to have felt the disorder just alluded to, and to have had recourse to specific conven-

tions, to fix the boundaries of the necessity alleged by belligerents; which boundaries, as thus fixed, were sometimes more extended, sometimes more restricted, according as the circumstances of the times, and the quality and relative power of the contracting parties, varied. In this way, from one nation imitating another, there was formed among nations, a law, conventional indeed, but general; by which it was declared, what goods ought not to be carried to the enemies, by neutral nations, in time of war; and other pactions were established, as to the mode of executing the law, and as to other articles, regarding the navigation and commerce of neutral nations during war. But as neither all nations entered into treaties with each other, nor all together united at the same time to fix that law, there was introduced in Europe, the custom, that, upon war having been declared, each of the belligerent governments made known to the neutral nations, with whom they had no special treaty, what were to be the rules, to which it was necessary that the latter should conform themselves, in their commerce with its enemies; in other words, intimated to the world, to what extent the necessity of its defence forced it to limit the commerce of the nations, who took no part in the war.

Although, however, the law which thus came to be observed, is worthy of praise, and was useful to the human race, it can only be placed in the category of conventional laws, not among those, which have their foundation in the general law of nations, or in the immutable law of nature; for justice applied to the interests of nations, is called *Jus Gentium*. It is consequently variable, both in its whole substance, and in each of its parts; as in fact it has varied from the most ancient treaty of commerce in modern Europe, between Edward III. of England, and the Maritime cities of the kingdom

of Portugal, in 1353, down to our times; and still varies even now.

These observations, continues Lampredi, have not been made by all. And finding established, the maxim that it was not lawful to carry to the enemy prohibited goods, commonly called contraband of war, and that the commerce of other goods was free to neutrals, provided they abstained from carrying them to besieged places or blockaded ports, these prohibitions were believed to be dependent on the general and primary, and not on the conventional, or secondary law of nations. And thus these conventional principles or maxims, have been expounded and commented on, as so many general rules of natural law; and have rendered the subject involved and intricate; this being the second cause which has generated the confusion before alluded to.

It is necessary, therefore, that we may proceed in order, and with regularity, to fix some general principles, which are most important for treating the subject with sufficient clearness.

1. That it is lawful for friendly and neutral nations, to prosecute in all its extent, their accustomed commerce; and that the only law restrictive of their liberty, if there can be said to be such, in time of war, is, that of observing in their conduct perfect impartiality.

2. That belligerent nations may, nevertheless, prevent the commerce which neutrals carry on with their enemies, to the extent, which they believe, to be necessary for their natural defence.

3. That the restrictions which nations at war have imposed upon that right, contenting themselves with preventing commerce in some kinds of goods, and not in others, although the necessity of their defence might require it, are owing to their spontaneous conventions.

4. That consequently, those goods which are called prohibited or contraband, in time of war, are not such, by the general law of nations, or because the general and natural laws of neutrality bind peaceful nations to abstain from commerce in them, but because they either have voluntarily promised not to protect and defend those subjects who may transport them to the enemy, and to abandon those subjects consequently to that law of necessity which has dictated the prohibition; or because, not having made any promise, they choose rather to respect the judgment of the belligerent, who has declared he will not suffer the enemy to be supplied by neutrals, with certain definite descriptions of goods, because this prohibition is believed to be proper for his natural defence, than to dispute the truth of this opinion, and to resort to arms; and therefore deny to their subjects who may suffer violence and confiscation, all protection and defence. We must not, therefore, regard the prohibition of commerce in certain commodities, particularly arms, and other warlike stores, as a natural consequence of neutrality, and as depending on the general law of nations; but as a simple convention by those who have so contracted, and as an acquiescence or passive concurrence in the practice of the greater part of nations, by those who have not entered into any such convention.

Now, continues Lampredi, at the close of this section, wishing not to confound the merely conventional and variable law of nations, with the primary and immutable law of nature, it appears to me, that all we have hitherto said, may be reduced to the following questions; may neutrals, after war has broken out, supply the enemy, in the way of commerce, with arms, warlike stores, and other goods commonly called contraband? I answer, that there is no law which prohibits them from doing so, provided they do so with perfect impartiality; unless

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they have bound themselves by special paction, to act otherwise.

May nations at war prevent this commerce, in case the necessity of their defence may require it?

I answer, that in the case put, they may not only prevent that commerce, but every other, provided they do so without any damage to neutrals, or not being able to do so without damage, make complete reparation when the parties have not made a different agreement with each other.

In § V, Lampredi inquires, whether the conventional law of nations, (as he calls it, founded on consent, express, or tacit,) which does not permit neutrals, with impunity, to supply the enemy with contraband goods, extends also, to the impartial sale of such goods, within their own territory. And he shows that this question is to be answered in the negative, whether it is to be considered as a question of fact, express consent by treaty, or tacit consent from usage and acquiescence; or as a question of law or right, to be determined by legal principle; no sovereign state having any control over the proceedings of another independent state, within its own territory.

In § VI, § VII, and § VIII, Lampredi proceeds, at greater length, perhaps, than was necessary, in refutation of the opposite doctrine maintained by his contemporary Galiani, to show by citations from international jurists, from Grotius to Vattel, and by the treaties between the different European nations, for three hundred years before he wrote, that it was held lawful, both by the general or natural law of nations, and also by the conventional law of Europe, for the subjects of a neutral state, to exchange or sell, within their own territory, goods of every description, even those which were deemed contraband, though exported by, or to the en-

emy. And it seems unnecessary to follow him through these sections, any further, than to notice his distinct statement of the requisites or constituents of contraband of war. The character of such goods, he observes, p. 79, is derived not merely from the use which may be made of them directly in war. Two circumstances must concur, p. 80, to make these goods assume the character of contraband. First, they must have been actually transferred in property to the enemy, or at least, have been directed or destined in such a manner, as that they may become the property of the enemy. Secondly, they must have passed out of the territory of the pacific or neutral sovereign. They then become *res hostiles*; assume the character of contraband goods; and if they are found in a territory not subject to any sovereign, as the sea is, from its not being capable or susceptible of occupation, they become the prize of the enemy, whatever be the flag which covers them; not merely because they are warlike instruments or stores, but because they are things belonging to the enemy, or at least are destined to become the property of the enemy, and to increase his strength.

In § IX, Lampredi thus proceeds to inquire, what are the contraband goods, of which neutrals cannot continue the transportation to belligerents in time of war, without the danger of seizure and confiscation.

If it be true, as we have before observed, that the external, political, and moral state of a people at peace, is not changed by a supervening war between two other nations; that not only the impartial sale of any commodity within its own territory, but even the transportation of it through the vast, free, and open sea, to nations who are enemies to each other, is naturally lawful; and, that any limitation to the independence and freedom of commerce is owing to express or tacit conventions, and

not to the primary law of nations, it follows, that the quality and quantity of contraband goods, are to be decided, not from natural reasons, but from the free will of nations, p. 103. Now, it appears, p. 107, that after many variations, this voluntary law of nations has generally fixed a certain principle, which forms the characteristic of contraband goods; and that those things only are to be regarded such, as are formed, reduced, and prepared, or constructed and adapted in such a specific manner, that they cannot immediately and directly serve any other purpose than use in war, and the art of public offence and defence by sea, as well as by land. In fact, articles so defined, (p. 108,) have, from the most ancient times, and with the smallest variation, been regarded in public treaties as contraband goods, and therefore subject to confiscation. But this uniformity has not been found, (p. 109,) with regard to those materials, natural or artificial, which, whatever they may be, are not directly subservient to the purposes of war; but may, nevertheless, be reduced and adapted to such purposes, by art and industry, such as nitre, sulphur, iron, lead, copper, hemp, canvas for sails, pitch, rosin, timber for building vessels, masts of ships, and similar articles; and even provisions, and money, which has always been regarded as the sinew of war. And in the earlier treaties, the number of such articles stipulated as contraband, was great. But, in the more modern treaties, contraband goods, have, according to an uniform principle, been very much reduced to materials, so prepared and specifically constructed or compounded, as to constitute arms or instruments of war, or ammunition.

In § X, Lampredi proceeds to inquire, whether the flag of a friendly or neutral nation, covers goods belonging to the enemy? Of this question, we formerly saw, Hübner in the war of 1756—63, maintained the

has no influence upon the effect, which they may produce. The moral, or rather juridical, or legal relation of property, does not change the substance or nature of the goods. And, although it did change, the goods pass into the property of the enemy, as soon as they are delivered to the purchaser. If then, we hold a belligerent may capture a cargo of grain, the property of the enemy found on board a neutral vessel, why should he not equally be held entitled to capture, or at least to prevent the transportation of that grain, which, while it is at sea, is the property of a friend, but which, when arrived at the ports of the enemy, will immediately pass into his property? And if the neutral should wish to repel such interruption or seizure, alleging that it was an invasion of the liberty of innocent commerce, why not give him the same answer, as in the former case, that he ought to ascribe this interruption to the calamitous necessity of war?

The apparent contradiction, or injustice, is encreased, if we concede the justice of the capture of hostile goods, on board friendly vessels, which are destined to neutral nations. For, if the capture is held to be lawful, because these goods, either changed into money, or exchanged for other goods, augment or preserve the strength of the mass of the nation, it is not easy to see, why the belligerent may not, upon that ground, prevent the direct importation of the same goods, which the neutral makes to his enemy, and which tends much more directly to the same end; seeing the neutral affords immediate aid or supply to the nation at war, while the merchant, a subject of the hostile government, cannot with his own goods, which he possesses in his own country, or in other places, give any such aid or supply, until after a long circuit, which is necessary that he may have a return for the goods exported, in other goods imported, both

carried in neutral vessels. The more, therefore, it is argued, the subject is considered, the more the difficulty seems to encrease; and it does not appear there is any mode of loosing this intricate knot.

Nor is it possible, continues Lampredi, to resolve the question which arises from the conflict and collision of the rights belonging to the belligerent and the neutral, by having recourse to the conventional and voluntary law of the European nations. They seem in their treaties of alliance and commerce, though entered into with a tranquil and serene mind, and in full peace, to have taken, sometimes the one side, sometimes the other side of the contradiction, according as they had more or less present to their minds, the advantages of commerce and the necessity of war; and still the conventional law of nations is upon this article very doubtful and uncertain. Lampredi here proceeds to prove the preceding statement, by a review of the treaties, from the earlier ones of the seventeenth century, down to the attempt of the Empress of Russia in 1780, to introduce her new system of an armed neutrality. But into this detail it is unnecessary to follow him, as we have already sufficiently noticed these different treaties, and their import and effects, in our view of Maritime international law during the seventeenth, and during the first part of the eighteenth century.

In spite, however, resumes Lampredi, of all these treaties, and of the liberty granted to neutrals, the sovereigns themselves who had granted it, have withdrawn it, upon the occasion of their being involved in war, promulgating ordinances and regulations of marine, which permitted privateers to capture hostile goods on board neutral vessels, and prescribing to neutrals other laws, restrictive of the liberty of commerce, and frequently contrary to the faith of treaties. Hence arose

grievances and complaints, and writings expressly composed to support the unlimited liberty of commerce in this department, and the wish of many to obtain it, at least by treaty, &c.

There has not, therefore, concludes Lampredi, been yet established, by the *Jus Gentium Pactitium*, or conventional law of nations, any uniform and constant rule, which might for a time, at least, remove or prevent the complaints and disputes which naturally arise from the collision of two equally natural and perfect rights. But we may certainly inquire what sort of rights these are; and thus pave the way for the nations of Europe, making such conventions on this disputed article, as may do the least possible damage to their respective rights, and preserve them as far as practicable, and as far as they are founded in reason.

It must, indeed, be confessed, that the maxim which would establish that the friendly flag covers and saves the goods of the enemy, provided they be not contraband, is generous, magnanimous, and most favourable to neutrals, and to the independence and liberty of commerce. It is desirable that all the great nations, without exception, should agree together, and extend their moderation in favour of commerce to that degree.

But it may be permitted to an impartial person to inquire, whether the nations who have not deemed it their duty to adopt this maxim, fail in, or do not act up to the primary law of nations; and therefore, commit naturally, an injustice, in persisting in capturing the goods of enemies found on board neutral vessels, when they are not bound to abstain from it, by a special convention. Now, it does not appear to me, that this maxim descends, or is derived from the strict law of nature, or from the primary and general law of nations. First, because the reasons which are adduced in support

of it, do not appear to me to be satisfactory or convincing. Secondly, because the contradictions which are magnified so much by some, as existing between this prohibition, and the liberties conceded to neutrals, both by the practice of nations (in treaties), and by international jurists, are merely apparent. Thirdly, because the faculty or power of covering with the neutral flag, the effects of enemies, is directly contrary to the rights conceded to belligerents, by the reason of nations, and not subject to the least controversy.

With regard to the first of the grounds of judgment just mentioned, Hübner, who more than any other writer, has undertaken to support the affirmative of the question, and treats it at great length in his work, *De la saisie des Batimens Neutres*, has accumulated all the arguments which he deemed the strongest, to demonstrate the truth and justice of the maxim, that the friendly flag covers goods belonging to the enemy.

He first makes use of a negative argument, and says, that if the belligerents have the right, which they pretend, it can only be founded either upon their own state, or upon that of neutrals, or upon the command of, or empire over, places. It is not founded upon their original state; because sovereigns are independent; no one has jurisdiction over the subjects of the other, in such a way, as to enable them to throw any obstacle or impediment in the way of commerce. It is not founded upon their accessory state of war; because that does not give them any right which goes beyond the persons and property of the enemy. But of that proposition, he adduces no proof. And we shall demonstrate in a little, that it is precisely from the accessory state of the belligerents, that the controverted right is in part derived.

Nor is it founded, Hübner proceeds to say, upon the ordinary or actual state of neutrals; because, as nations,

they are not subject to any one, and as neutrals, they are bound not to take any part in the war; but, by no means to alter, in any respect, their navigation and commerce. Of this last position, however, he as little adduces any proof or argument to support it.

That this right does not depend on the command or dominion over places, there is no occasion for any proof, since no one has ever derived it from such a source; and besides, it is well known, that the case here treated of, is always that of prizes made in the vast sea, incapable of occupation, where no sovereign has a right to exercise any jurisdiction.

In another place, Hübner resumes this subject, and the following are his arguments in support of his position. The duties of neutrals, he says, are reducible to two chief heads; to remaining totally inactive with regard to the war, and all its operations; and to perfect impartiality in all the rest of their conduct. But giving their work, labour, or services, in transporting merchandise not prohibited, neither makes them take a part in the war, nor is inconsistent with their impartiality; therefore, the transportation of the goods of the enemy, which are not contraband of war, ought to be deemed lawful. And such we believe it to be, as we shall soon see. But from this, it does not follow, that their flag should cover the goods of the enemy, in such a manner as that the belligerent ought to abstain from capturing them.

But neutrals, it has been answered, have a right to live, and to sell to whomsoever they choose, their goods, industrial as well as natural, and to lease out their labour or services, and their effects, to such persons as may require them. It is, therefore, a glaring act of injustice, to prevent them from exercising that right, and to compel them, in a manner, to die of hunger, in the case of conveyance by sea, of the goods of others, being one of their principal means of supporting life.

The belligerent, on the other hand, Lampredi replies, has a right to hurt or damage his enemy, and to diminish his strength to that degree which his defence requires, of the quantity and extent of which, he is the sole judge. Now, if he believes that he ought in every way, to interrupt the commerce of his enemy with other nations, to dry up the sources of that wealth, which renders him imperious and unjust, and obstinate in continuing the war, would not the person who should pretend to prevent or interrupt, as far as in his power, the exercise of this right competent to the belligerent, and should wish to promote by his labour or service, the commerce of his enemy, by taking from the territory of that enemy their goods, and bringing back those which they might acquire from other quarters; and farther, desire that his flag should cover and save the goods of the enemy, would not a person acting so, do a hurt or damage, a wrong and a manifest injury to the belligerent? would he not clearly invade and infringe the indisputable rights of the latter?

So much, continues Lampredi, for what may be said for, or against the maxim, in the so long agitated question, whether the neutral flag covers and renders free, the goods of the enemy. But this does not serve to convince any one, either on the one side or the other. After all these reasons, the contradictions before pointed out, which seem irreconcilable, still remain; there remains the manifest right of neutrals to turn their labour and industry to account, without involving themselves, or taking a part in the war; which, it appears, cannot be reasonably prevented by belligerents.

Truth, however, is one and single; and in moral (juridical) questions, we are generally able to discover it, provided we travel by the road which directly leads to it. But this road has been mistaken and missed by

those who have treated this subject; they have wandered in a circle round the truth. They have confounded together two questions, which are most different from each other; and from this mistake, has resulted all the confusion before described. The first is, whether neutrals can be prevented by belligerents from carrying on that commerce of economy, which they did before the war, letting out their labour or industry, and their vessels to belligerent nations? The second question is, whether the neutral flag covers the goods of the enemy; that is, whether a belligerent can capture as prize, the goods of the enemy found on board a neutral vessel? The one question is totally independent of the other; the principles adapted for the solution of the first, do not apply or suit for the solution of the other; the one may be true, and the other false, without the least contradiction.

Let then, continues Lampredi, these two very distinct questions be proposed of new. Is it lawful for neutrals to lease out their marine labour or industry, and their ships to serve the commerce of belligerents? I answer, it is most lawful, provided they do not carry to the enemy goods contraband of war; and with me, so answer all the nations of Europe, who have never pretended that neutrals should abstain from that commerce, which is a peaceful operation, and has no relation to the actual state of the war, and, consequently, does not infringe in any way, the law of their neutrality, by which they are bound not to take any part in the war, but certainly not to deprive themselves of their natural right to turn their industry to account for the sustenance of life, as they are not deprived of the right of selling to the belligerent nations, their goods, natural and industrial, as they did before. No nation has ever pretended, that in war, neutrals should suspend their accustomed

specific commerce. And the question now under consideration, either has never been made a question, or has been solved by the universal practice of nations at war, regarding every kind of commerce, either direct and proper, or indirect and by commission, holding it to be permitted and lawful.

The second question is, is it lawful for belligerents, either in the adjacent seas occupied by them, or in the vast open seas or oceans, which do not admit of such occupation, to arrest or stop neutral vessels, to search on board them for goods, the property of the enemy, and if found, to seize them legitimately, and make them their own, as good prize? I answer, that it is lawful, provided they pay the freight agreed upon with the master of the vessel, and make reparation for the losses which may have supervened from the voyage being retarded. It is certain, that the belligerent has a right to invade, and take as booty, or prize, the goods of the enemy, in order to diminish his strength, and force him to make peace, as we have before observed. He exercises lawfully that right, wherever acts of hostility are permitted to him by the law of nations; that is, either in his own territory, or in the territory of the enemy, and in whatever other place which is not subject to the jurisdiction of any sovereign; but the vast sea is precisely of the last description; therefore, he has a right there, to seize, as prize, the goods of his enemy, in whatever way chance may present them to him.

But, on the other side, neutrals answer, that being precisely in *territorio nullius*, and to be regarded simply as individual men, belonging to no nation, and in the simple state of nature, they are not bound to suffer any violence; and that, therefore, whoever stops or arrests them, and goes on board their vessels, and attempts to take cognizance of the goods which are on board their

vessels, does them a wrong and an injury, or invades and infringes their liberty and independence; two inviolable rights by nature.

This is in what precisely consists the question, which has been so cruelly involved. There are two rights in collision; the one that of the belligerent to capture as prize, the goods of the enemy, provided it be in a territory not subject to the jurisdiction of any one; the other, that of the neutral not to be disturbed in their pacific navigation, permitted and lawful. Both the one and the other right are true and just; but, if the neutral and friendly flag saves the goods of the enemy, the manifest right of the belligerents, to seize as prize, the hostile goods, remains without effect, or in abeyance; if it does not save them, the equally manifest rights of neutrals, not to suffer violence to their natural liberty, and not to be disturbed in their navigation beyond the laws of neutrality, remains violated and infringed. The execution, therefore, of two rights, is contemporaneously impossible, and the one right is destructive of the other; what then does justice and the public reason of nations require?

In this collision of rights, it is an inviolable law of nature, that is to say, of right reason, that the right of which the non-enforcement occasions damage, but easily reparable, and of which the enforcement occasions damage to the other party, which cannot be repaired in any way, or only with much greater difficulty and expense, shall remain suspended. This rule of natural justice and equity, Lampredi illustrates by the use made of the property of a private individual for strengthening and heightening the embankments of a river, which, overflowing its ordinary barriers, threatens the inundation and destruction of the crops of all the lower fields, in the plain or valley, and by the seizure in the open

seas of vessels loaded with grain, during an extreme scarcity of food, in order to prevent the starvation and death of the inhabitants of a populous city or province. He then proceeds thus.

Now, what is the nature of the loss which neutrals suffer from the suspension of their right to navigate freely, and without any impediment, through the vast sea? It is no other than the delay which the visitation of their vessels, and the subsequent delivery and deposition of the goods of the enemy occasions. For in all other respects, the rights of property, and of the independence of friendly nations are scrupulously observed by the belligerents, according to the common consuetudinary law of nations, which is the offspring of the universal law of nations itself,—the sole regulator of their actions. The captors pay the freight due for the hostile goods, as the owners of them would have paid it, and when the confiscation of the goods is executed or completed, they leave the neutral master and crew at full liberty. It is farther to be observed, that, to the delay which is unavoidably occasioned by the legal confiscation of the goods of the enemy, which they have on board, they have voluntarily exposed themselves as soon as they loaded hostile goods; and that it may consequently be maintained, the delay ought to be imputed to themselves, not to the belligerents, who exercise a perfect right. But since substantially also, there was competent to the neutrals, a perfect right to load their vessels with merchandise of any kind, provided they were not contraband of war, and since it is in consequence of the collision of rights merely, that they suffer innocently the delay, the belligerent ought undoubtedly to make reparation for the loss, which the delay required for the legitimate confiscation, may have occasioned to them.

Let us now see, continues Lampredi, what is the nature of the loss which the belligerent would suffer, if the right to capture, as prize, the goods of the enemy on board neutral vessels, were to be suspended. Necessity compels the belligerent to take from his enemy all means which may render him stronger and more prepared and able for defence; necessity compels him to weaken the enemy in every way, that he may be disposed to peace; every augmentation of force, which may prolong the war, produces slaughter and death, and brings upon him irreparable loss. Thus the loss which results to neutrals from the suspension of their right, may be valued at so much, and may be easily repaired; and the invasion which they suffer, in their liberty and independence, is a slight sacrifice to be made to the extreme necessity of defence; the loss which results to belligerents does not admit of any estimation or reparation.

It is quite consistent, therefore, with the tenor of the laws of nature, that the first be suspended, and that the second be exercised, under the obligation of completely repairing the loss, as we have suggested: and, as a consequence, such has been the general practice of nations, transmitted to our times. I have no wish, continues Lampredi, to assert, that the commanders of privateers, in the act of exercising their right, do not sometimes transgress the boundaries of justice, and occasion trouble to peaceful vessels, and vexation beyond necessity. And I have no intention to justify the abuse of force, and the odious and detestable exercise of excessive or brute violence. I say merely, that the right is just; and that the many and long declamations which have been made, and are still made against it, are not founded in reason. And I say also, that in this age, which I know not with what reason, is called by us, "the enlightened," we

have returned to the practice of many ages back, in which, precisely, the rules of the most rigid law of nations were enforced. So true is it, that justice makes itself felt in the hearts of men in all times, provided the desire of appearing more wise and subtle than the men who have preceded us, does not disturb reason, and engender in the mind, the spirit of presumption, under the guidance of which, there never was anything done in the world, which was just and good. -

But these lamentations are so far pardonable. Two things have been confounded, which are most distinct from each other: the stoppage of the neutral vessel to give effect to the capture of the goods of the enemy as prize; and the supposed prohibition against neutrals trading by commission with the enemy, and against their letting out to the enemy their labour, or services, and their vessels. Against the first supposed violence, the greatest complaints have been made; and the complaints were just. But we have seen that this supposed prohibition is a chimera. After the confiscation has taken place, the neutrals may return of new to offer their services and their vessels, to the belligerent nation. This right is thus left entire to them and intact; neither by the exercise of it, can they suffer punishment or loss. Of what then do they complain? But the dread of plunder, say neutrals, frightens the enemy so much, that they suspend, or entirely abandon every kind of commerce, and no longer employ either the industry, or the vessels of neutrals, or at least do so less frequently. I repeat, this ought to be attributed more to misfortune, or to the accidents of war, than to the fault of the belligerent, who is not bound to suffer in peace, any injustice, or not to vindicate and reclaim a right usurped by another, on account of the damage which a third party may suffer from war, and his natural defence; just pre-

cisely as a private individual is not bound to abstain from digging a well in his own ground, because it may perhaps cut the vein which conducts the water to the fountain of his neighbour, or to abstain from reclaiming a land estate, from a *malâ fide* possessor, because a few pensioners may, through the diminution of the wealth of their patron, lose their pensions, and be reduced to beggary. We are here investigating the rules of strict and rigid justice; not those of virtue, which do not fall within the sphere of the present discussion.

Moreover, there is no exercise, execution, or enforcement of a perfect right, which may not bring annoyance, trouble, and loss, to some individual. I raise my house, and take the light from my neighbour; I surround my field with a fence, and obstruct a passage convenient for the adjacent proprietors; I sell my commodities, and diminish the price of those belonging to others, because the number of purchasers from them is diminished; I undertake one kind of commerce, and diminish the gains of a third party, who was formerly the only person in that trade, &c. But on account of these annoyances and inconveniences which some individuals may experience, the exercise of these rights cannot be prevented, except in the case of extreme necessity, in the collision of rights, and with the precautions before explained. In like manner, the natural right of neutrals to prosecute with the belligerent nations, their accustomed commerce, is prejudicial to the latter. Many neutral ships loaded with hostile goods, elude the vigilance of the cruisers of the opposed belligerent; but that right is not, on that account, less just.

These reflections, continues Lampredi, enable me to reconcile, or do away the contradictions before pointed out. If it is lawful, say some, to take as prize, the goods of the enemy wherever they are found, and even on

board peaceful vessels, to the manifest infringement of the liberty of neutrals; because, the one enemy has the right to diminish the strength of the other indefinitely, for the purpose of disposing him to peace, why is it not also lawful to arrest and prevent neutrals likewise, from carrying their own goods to the coasts of the enemy? Do not the enemy derive from these goods an addition of strength, which brings upon the other party an imparable loss? why is the first unlawful, and the second lawful? why does the necessity of your defence permit you to invade the liberty and independence of those who carry goods belonging to the enemy, and does not permit you to do the same with neutrals, who carry their own goods? I answer, because, in the former case, the loss occasioned by the capture falls almost wholly on the enemy; and, the little which falls upon friends or neutrals, may, as we have seen, be easily repaired. But, in the other case, the loss which neutrals would sustain, from being prevented from selling as they formerly did, their natural and industrial commodities, to the nations who are now accidentally at war, would fall wholly upon them, and could not, in any way, be repaired or compensated. If such loss could be repaired or compensated, I doubt not, the belligerent would have a right to arrest all the ships of neutrals which carry goods useful to the hostile nation, upon offering, for example, to purchase them in ready money; and, if an exchange was agreed upon, offering to supply the article at the same price, and on the same conditions. But as the first would require an enormous expenditure, which no nation could sustain; and the second would be morally impossible, since one nation cannot be provided with the natural and industrial commodities, which are peculiar to another; the result is, that between the two perfect rights, which are found to be in collision, the

exercise of that is permitted, which, if prevented, would occasion a loss, not susceptible of reparation in any way.

This very strong reason, continues Lampredi, to which it does not appear to me, any adequate answer can be made, formerly convinced me, and still convinces me, that there is no contradiction between the two rules of the law of nations, of which the one permits the capture as prize, of hostile goods on board the vessels of neutrals, and the other allows neutrals the sale and the conveyance of their own goods to hostile nations. Both ought to be regarded as inviolable rules by belligerent, and by pacific nations, in time of war; and both are founded in reason. For they preserve at one and the same time, both the rights of belligerents and those of neutrals, among whom, if those who let out for wages, or freight, their services and their vessels, sustain some loss, they ought to complain, not so much of the belligerents, as if the misfortune of the war, of which the hurtful and pernicious effects are more or less felt by all the other Maritime commercial nations, particularly by those who had been accustomed to have an ordinary trade with the nations at war.

If, therefore, belligerent nations, arresting the merchant vessels of neutrals, containing hostile goods, besides paying the freight due to the master of the vessel, were to pay also the loss, which he can show he has sustained, from this stoppage or detention, they would act according to the rule of the most rigid justice. I know that in practice, this damage is not compensated. I know farther, that neutral vessels carried into the harbours of the states, whose subjects have made the seizure, suffer a thousand vexations, and languish long in expectation of liberty to sail; but in return I say, that I do not justify abuses, and that my sole intention in the present article is to prove, that the pretension of

neutrals to cover with their flag, the goods of the enemy, as well as their own, does not appear to be founded on the solid basis of the general law of nations.

After this not brief refutation, continues Lampredi, of Hübner's first argument, it seems almost superfluous to answer the others. That I may not, however, leave any doubt on a subject so interesting and so delicate, I explain also his second argument, of which the following is the substance.

It is free, in general, to all neutral nations to trade with the belligerents, in time of war, on the same footing on which they traded in time of peace; saving and excepting the laws of neutrality.

But mercantile agency or commission, and letting out for wages or freight, one's industry and one's vessels, is a kind of trade very frequent in time of peace.

Therefore, the neutral flag ought to cover completely, merchandise not prohibited or contraband, although they belong in property to the enemy.

Truly, in the language of the schools, this is an informal syllogism; and, although we admit as true the two premises, the conclusion which follows from them, is not that which Hübner deduces, but rather this: therefore the commerce which is carried on by commission, and by letting out to belligerents their services and vessels, is free and permitted to neutrals. This was the legitimate consequence or conclusion, and we have admitted it; and belligerents always admit it, when, after capturing as prize the hostile cargo, they allow the neutral to return of new to offer his services and his vessel to the enemy. But this right does not produce the other, of covering with their flag, whatever hostile goods may be found on board, as we have before observed. The same error which prevails in the first argument, prevails also in the second; and it therefore does not merit greater or more minute refutation.

The third argument, continues Lampredi, to which the author referred to, has recourse, has no greater force, and may be reduced to the following syllogism.

The merchandise and goods of enemies are not liable or subject to be legitimately captured as prize, when they are in a neutral and friendly place.

But neutral vessels are a neutral and friendly place.

Therefore, the goods of neutrals cannot be captured as prize, when they are on board neutral vessels; since, says he, it is the same thing precisely to seize them as prize on board a neutral vessel, as when situated in a neutral territory: along with which he goes on to explain, that under the denomination of place, the same thing is understood as territory.

The second proposition is entirely false; and therefore the consequence deduced, or conclusion, is also false. It is not true, that a small body of men, who navigate the deep sea, that is, who are in a territory not subject to the jurisdiction of any one, ought to be considered or reputed as in the territory of that nation, whose flag they hoist; and yet Hübner asserts this gratuitously, and without the least proof. The flag, when it is accompanied by the sea papers or documents, in regular form, serves no other purpose, than to show the nation to which the navigators or crew belong, and from which they have departed with the public permission of sailing, and of hoisting the flag of their nation; in other respects, and with regard to the other strangers whom they meet, they are simply individual men, who, in relation to these strangers, have no other law to observe than that of nature, and in addition, that which their sovereign has prescribed to them, with regard to the conduct which they ought to observe in relation to foreigners, whom they meet on the open sea.

Two vessels which meet each other in open sea, do

not materially differ from two waggon found in a desert not occupied by any one. And as it would be ridiculous for one of them to pretend to be regarded as a territory, for example, the Venetian, because it carried, raised on a spear, the arms of that Republic, so it is equally ridiculous for a waggon or carriage at sea, to pretend that, by hoisting a flag with the arms of a nation, it must be considered as a part of its territory, and is, therefore, inviolable. The men who are found in it are inviolable; but, by reason of the law of nature, which renders them free and independent of all except their legitimate sovereign; not by reason of their flag, which cannot cause men, who are in fact actually in a territory which belongs to no one, to be regarded as in a territory belonging to their sovereign. And, although it may be true, that the sovereign takes cognizance of acts of violence and injustice, committed against his subjects when sailing on the high seas, and demands, and even by armed force exacts reparation, he does this, not in virtue of a right to resist or repel an invasion of his territory, but in consequence of the general obligation under which he lies, to defend his subjects from every violence, internal and external, and to procure reparation of the loss, which they have thereby sustained.

. Nevertheless, some have carried so much farther, this strange opinion, which arose in times, when nations deemed themselves absolute masters of immense tracts of the vast oceans, as to have come to believe and maintain, that ships of war in particular, ought to be reputed part of the territory of the nation, whose flag they hoisted, not only in the vast waters of the sea, which do not admit of occupancy, but also in those waters which admit of such occupancy, and also when they have cast anchor in the ports, roadsteads, bays, or creeks of foreign nations. But this is most false or erroneous; for in the territory of a

state, there is neither person nor place, over which the sovereign does not exercise the supreme power; nor does the quality of the carriages or vehicles, in which foreigners enter, within the boundaries of the territory, nor their number, alter, in the slightest degree, the right of the sovereign.

The nation, to which the persons on board the vessel belong, as subjects, may declare, that the vessel shall be held to be its territory, with regard to all the acts or deeds of these individuals, which are to have validity in their native country; to the effect, that children born in the vessel, are to be considered as born in the native country; to the effect, that donations, testaments, and other transferences of property, shall have force and validity in the country of the donor, testator, &c.; but never to the effect of withdrawing or releasing the people of the vessel, from the jurisdiction of the sovereign of the place, where she lies, or stops, or is stationed.

The other illusion may have its origin in sometimes observing, that on board ships of war, which are lying in those parts of the sea, which admit of appropriation, and are consequently within the territory, the rights which belong to the supreme power, are sometimes exercised by the commanders, even to the extent of inflicting punishment. Hence some persons inconsiderately infer, that the vessel is a foreign territory. But this illusion disappears, as soon as we reflect that this exercise of jurisdiction is not founded upon the law of territory, but upon the nature of military command; which is understood to remain untouched, and in full vigour, as often as the sovereign of the place consents to receive a ship of war, as such. Such a ship of war cannot exist and be governed without the perpetual duration of military command, which consequently continues to be exercised, in all its extent, within the ves-

sel, more in virtue of the concession of the prince who receives the ship, than from any right on the part of the captain, much less in virtue of any territorial right.

In Section XI, Lampredi inquires, whether the goods of friends or neutrals are liable to confiscation, if found on board hostile vessels at sea.

Over the goods of friends, the belligerents have no right, in whatever place they may be found, even within the territory of the enemy. If, therefore, there be taken by assault, a Maritime fortress or port, and there are found at anchor, neutral vessels, and their respective cargoes, they must all be held safe and inviolable; except in the case of the goods being contraband of war, and provided always the masters of the vessels have not taken arms, and voluntarily served the enemy, in which case, they behaved to be viewed as allies or confederates of the enemy.

Much more ought the goods of neutrals found on board hostile vessels, to be held safe and free. For such vessels can still less be regarded as the territory of the belligerent party: and it would be absurd to maintain, that because the other party has the right of making prize of the goods of the enemy, he may equally make prize of those of friends, because they are found by chance mixed with the former; as if the contact of the hostile goods had communicated the infection to them, and had made them change their nature.

The justice of this rule of public reason, says Lampredi, was felt in the good old times, in which loyalty and good faith had perhaps greater influence over the minds and hearts of men, than they have in our days, in which private interest and the avidity of gain have contracted the spirit, and blunted the feelings of justice. But in later times, this maxim was departed from; and now a days it has become a common practice in the

treaties among the European nations, to stipulate or provide, that the confiscation of the vessel, as belonging to the enemy, implies the confiscation of the cargo, although in whole, or in part, belonging to neutral and friendly nations.

There is no reason which can justify this abuse. And, perhaps, nations have agreed to tolerate it reciprocally, in order to avoid the risk of enemies availing themselves of the name of neutrals, their secret friends, to the effect of withdrawing their goods from the risk of capture as prize; which might have been, and might be more easy, if it were admitted that goods loaded on account of neutrals and their property, could not be captured as prize, even though found in hostile vessels. There is no doubt, that the private, and conventional law may derogate from the public law of nations. But where this derogation has not been made, by the special convention of parties, the primitive law remains in vigour; which gives a right to neutrals to recover their goods seized as prize, in consequence of their being found on board hostile vessels, as soon as they can establish their property by evidence. To this statement of the law by Lampredi, it may be added, in point of fact, that, in their administration of the law of nations, independently of special paction, France and Spain, as we have seen, during the sixteenth and seventeenth, and even during part of the eighteenth century, adopted the new or conventional, and more rigid rule, while England adhered to the old and more just and liberal rule.

In his XII Section, Lampredi inquires, whether the arrest or stoppage at sea, and the subsequent visitation and search of neutral vessels, be founded on the law of nations, and how they ought to be executed.

If, says he, as we have shown above, belligerents have

the right, partly by the conventional law, partly by the general and primary law of nations, to prevent neutrals from carrying to the enemy, goods contraband of war; if they have the right to attack and capture the vessels of their enemies, and also to capture as prize their goods, though found on board neutral vessels, the same law must necessarily concede to them, all the means, without which, they could not enforce these, their rights. But the only means of executing and rendering these rights effectual, are the arrest or stoppage, and the subsequent visitation and search of these vessels. These measures are therefore permitted and legitimate; and against all such persons as may pretend to prevent them, force may be lawfully used. The end or object of the visitation is determined by the quality of the rights, which justify it, and is primarily directed to discover, first, whether the vessels which sail in the open sea be neutral or hostile; secondly, whether they have on board goods contraband of war, or the property of the enemy.

Whoever, therefore, sails on the high seas, in the prosecution of commerce, if he wishes to be treated as neutral or friendly by the nations at war, must be furnished with authentic documents, which prove the first, and exclude entirely the suspicion of the second. For proving the first, it would be a very doubtful argument and full of danger, to rely upon the flag merely, which the crew may hoist in the open sea. The subjects of the nations at war, and the neutrals themselves, might, in this way, easily escape both from capture, and from visitation and search, and thus render the right of the belligerents vain and ineffectual. To this may be added, that the flag, at the most, could give assurance only of the nationality of the crew, not of the innocent nature of the cargo.

Still more doubtful and uncertain does the argument,

to be drawn from the flag become, from the custom introduced a long time ago, having passed into an universal practice, of hoisting and sailing with such flags, as the commander of the ship might choose, for the purpose of surprising hostile vessels, and of approaching them in such a manner, that they cannot escape capture. But, as neutrals might sustain great loss, if, obeying the call or summons of an armed vessel, they should find themselves under, or within the cannon shot of an actual pirate or sea robber, it is clear, they are not bound to lend faith to the flag hoisted, until they have ascertained beyond doubt, the sincerity and legitimacy of the same. Hence, notwithstanding the signal, which the privateer may make, that the merchant vessel may stop by lowering her sails; and, notwithstanding the summons given with the marine trumpet, even though heard by the neutral, the latter may, nevertheless, continue his course, at full sail, and prepare himself, if necessary, for defence against the risk of receiving violence and injury from a pirate, who might conceal his design under the flag of a friendly nation. Nor can the belligerent complain of this, as of a wrong done to him, as being a voluntary obstruction thrown in the way of his right, to visit the vessels which he meets on the high seas; for before exercising that right, he is bound to justify his person, for which the simple exhibition of his flag is not sufficient. Every one sees that the two rights being in collision, the suspension of them brings upon both the one and the other party, an irreparable loss, since the one stopping at the sight of the flag only, would very frequently encounter depredation, slavery and death; the other not being able to stop the vessel by the summons, would very frequently lose their prize, and would not be able either to interrupt the commerce of the enemy, or to prevent the aid, which his friends might afford him; and both

the one and the other would be necessitated to resort to force, with reciprocal and great loss. It was necessary, therefore, that among the maritime trading nations of Europe, some temperate measure should be found, which might relieve neutrals from the fear of danger, and might facilitate to belligerents the enforcement of their rights, without the necessity of committing violence and injustice.

This has been accomplished, as far as the nature of things, and the lamentable circumstances of war, permitted. And after many public conventions, it passed into an universal law of war, that no credit should be given, no reliance should be placed upon the flag hoisted by belligerents, unless it was assured or confirmed by firing a cannon unloaded with ball, by which the captain of the armed ship pledged himself, that the flag which he had displayed was true and sincere. And as even this signal is not capable in itself, of giving complete security to the neutral, inasmuch as it may be imitated by a pirate or sea robber, so it has become an universal rule of the conventional consuetudinary law of nations, that, after this signal, the armed vessel does not go close upon the neutral vessel, but keeping at a suitable distance, that is, at the distance of a cannon-shot, or half a cannon-shot, puts out his long boat, into which two, or at most three, official people go, and sail or row towards the neutral vessel, to execute the visitation.

This pacific conduct, removing from the neutral vessel all suspicion, and fully justifying the person and the nationality of the cruiser, obliges the neutral vessel to stop, and to suffer the visitation, to which the belligerent has a perfect right; and if the neutral vessel should endeavour to evade it, and to prevent by flight or force, its legitimate execution, she may justly be treated as

an enemy. In fact, all nations regard as such, a neutral vessel, which tries to escape the visitation, either by flight, or by defending itself by force of arms. And it is subjected to confiscation, and declared good prize. By all the ordinances of marine and war, or by the conventional (consuetudinary) law of nations, which in substance, is nothing else than an explanation of the primary and general law of nature, which justifies force against every one who endeavours to prevent the exercise of a perfect right, and when required to remove the impediment, does not cease, but perseveres in doing an injury. In this case, continues Lampredi, you may use force, until the obstruction be completely removed; and if you believe it conducive to your security, and to the good behaviour of the unjust violator of your rights, to do him as much harm as may be sufficient to take from him the desire of offending you in future, you may do so lawfully; provided, in fixing the quantity of the evil inflicted, there do not enter either the heat of anger, or the bitterness of revenge, but only the necessity of your defence. Now, as in the state of nature, the quantity of evil, at least externally, is left to the discretion of the offended party, it appears to me, that belligerents are sufficiently moderate, if, in the case before supposed, they content themselves, leaving the persons free, with confiscating the vessel and the cargo, of every one who endeavours, without any reason, to evade by flight or force, the visit which they have a legitimate right to execute. I have said without any reason; because an armed ship of war, which keeps at a distance, such as not to offend the neutral, and shows, by sending his official people by sea, towards him, that he has solely pacific views, removes every suspicion of violence and aggression, which could justify either flight or force. The visitation being an act totally pacific, and directed

to verify the neutrality which the vessel has indicated by its flag, and the innocence of its cargo, with regard to contraband goods, and the property of the enemy, the visitors ought to be content with executing it, with the least consumption of time, and the least loss to the neutral; so much more, as they exercise this right in the way of collision, and in virtue of extreme necessity. When, therefore, the sea papers, which the universal practice of trading nations has determined to be necessary, to verify both the objects before indicated, are regular, they ought to be fully satisfied, unless they have a well founded suspicion of fraud; in which case, I believe a more scrupulous search to be lawful and permitted; always, however, within the limits of moderation, and with the least loss to the neutral, except in this case; every search originating in avarice and superior power, is an unjust violence, which authorizes the sovereign of the neutrals, and protector of their rights, to demand reparation, and, if denied, to exact it by open force. If the sea papers are not regular, or are entirely wanting, it is presumed with reason, there has been an intention to commit a fraud, to the prejudice of the belligerent; and the vessel with its cargo, becomes a good prize, as lawful capture, unless the captain can distinctly account for the irregularity, or the want of the papers, and thus justify his conduct. This usage of nations is founded on reason; for he who may, and ought to know, that in order to be treated as a friend or neutral, on his voyage, he must be furnished with certain determinate documents, yet neglects to provide them, and he who may, and ought to know, that if he omits to provide them, he will be treated as an enemy, without regard to his neutrality, indirectly, at least wills to expose himself to confiscation; and, consequently, by capturing him, no injury is done to him, unless he can

prove that the want of, or the irregularity in, his documents is involuntary, and caused by misfortune.

In his XIII Section, Lampredi inquires, when the property of captured neutral vessels, or of their captured cargoes, is transferred to the belligerent. When the owners and commanders of lawful cruisers, that is, those furnished with letters patent or of marque, enter into the service of a belligerent sovereign, they act in his name, and acquire for him the prizes they take, unless it has been otherwise arranged. It frequently happens, however, that the sovereign, in order to animate his subjects, to reduce the power of the enemy, excites them to undertake maritime expeditions or cruizes, at their own expense, by giving them the booty, or contenting himself with a small portion of it. And then the dangers they encounter, and the expenses they incur, are compensated to them by the alluring hope of great gain.

The right of capture, or at least of arrest or stoppage, may be exercised against a neutral vessel for four reasons: because she carries goods contraband of war, or because she has on board goods the property of the enemy, or because she has not her sea papers in regular order, or because she has failed in observing some of the general rules of neutrality. In the first and second case, the property of the captured goods may pass immediately to the captor, if the captain of the merchant vessel, recognizing the legitimate right of the cruiser, resolves without farther delay, to deliver up the contraband of war, and the goods belonging to the enemy. To pretend in these cases, to molest the neutral with useless formalities, and to detain his vessel for a longer time than the full execution of the right of the captor requires, is an unjust act, and contrary to the law of nations, which commands us to exercise our rights with the least damage to others. Nevertheless, however, the greatest part of the European

marine ordinances, command privateers and cruizers, not to appropriate to themselves any goods found in vessels, whether neutral or hostile, although clearly confiscable, and recognized as such, by the master of the arrested vessel, until she has been visited by the officers of the court of admiralty, and has been adjudged good prize by its definitive sentence.

The European nations have, perhaps, agreed to tolerate this species of injustice, in order to avoid a greater evil, as well on the part of the captors, as on that of the neutrals; for otherwise the captors might easily withhold from the treasury, their prize goods, by selling them in neutral and friendly ports, thus defrauding the rights of the sovereign. The neutrals, if secure of not losing their freight, and of not being detained on their voyage, longer than is sufficient for delivering over the goods of the enemy, would hazard that traffic with greater facility and frequency, and thus often escape the vigilance of the guardians of the sea, and perhaps act in concert with the privateers themselves, in order to divide the spoil of the unfortunate owner of the cargo, who, besides the dangers of war, would thus also incur the risk of the frauds of men. But, whatever may be the reason, it is true, that this custom has now a days passed into a law; and that the property of the prize does not pass to the captors, or the treasury, until after it has been adjudged legitimate, by judges expressly appointed for that purpose.

This law of war, however, continues Lampredi, although founded on the conventional, (common and consuetudinary?) law of nations, is likewise conformable to the law of nature, absolutely with regard to the two last cases, and relatively with regard to the two first. For since the frauds of privateers generally, and the collusion of neutrals, cannot be otherwise avoided, than

by obliging the captured to allow themselves to be conducted to the country of the captor, this new impediment to their navigation, is produced partly by necessity, partly by common utility, which is the measure of justice. Then it is evidently just, so far as regards the two last cases; because the justice of the capture depending upon the supposed want, or irregularity of the sea papers, or on the contravention in general of the laws of neutrality, the property of the captured articles ought not to pass absolutely to the captor, until after the sentence of a legitimate judge, however much the captors and the captured may have agreed upon the justice and legitimacy of the title to the prize; both because the captor would most frequently be a partial judge, and because the captured being for the most part only the hired servant of the owners of the cargo or vessel, has no right to transact, and much less to consent to the confiscation of the goods of others.

In his last Section, § XIV, Lampredi inquires who is the judge of the legality of prizes.

There is incredible confusion, says he, in the writers on the theory of the just and the unjust, with regard to this article; which, while they were disputing in their closets, has been decided by the universal practice of the nations of Europe. They suffer in peace, that the judges appointed by the belligerent nations, pronounce upon the legality of the stoppages and captures made by their cruizers, and conducted into their own territories; and with regard to those, which, from vis major, such as tempestuous weather, or spontaneously are carried into a peaceful or neutral territory, they refer to the general law of nations. The question, therefore, is reduced to this—to know whether this practice universally adopted by the European nations in the first case, be just; and, in the second, what the public reason of nations directs.

Before deciding the question here proposed, it is necessary to take care not to confound together two things which are most different from each other; that is, a vessel with a neutral flag and patent, and the nation to whom it belongs—the men who were originally born, or became subjects of a sovereign, and who are found on the vast ocean, or open sea, in a marine vehicle, called a ship, and the entire civil society, and its sovereign, to whom they belong.

The acts which any stranger may commit upon, or against this ship and these men, are not understood, and cannot be understood as done against the nation or its sovereign; just as the acts which these neutral men may commit against others, whether belligerent or at peace on the sea, whether free and open, or so far appropriated, are not understood, and cannot be understood, as done by the entire nation or its sovereign, of whom they were originally the subjects.

A person, therefore, would not be in the right way of deciding this question, who should believe that when a belligerent causes to be adjudicated in his own territory, the prizes which his own cruizers pretend to have lawfully made against neutral vessels, he presumes to exercise jurisdiction over the neutral sovereign, to whom the captured individuals merely preserve an habitual subjection.

It is farther necessary, continues Lampredi, to repeat of new, what I have observed elsewhere, that a vessel on the high seas, and in free and open waters, cannot be regarded as the territory of that sovereign, whose flag she may legitimately exhibit, for the reasons before assigned; and that consequently, the armed vessel and the neutral merchant vessel, contain two small companies of men, who have no other laws to observe towards each other, than the immutable laws of nature,

and those varying and mutable laws, which are the offspring of war, and expire with it.

These things being premised, it is very easy to see, that when a cruizer stops and visits on the high seas a neutral vessel, he does not exercise, in any way, an act of jurisdiction, which he arrogates to himself, but merely executes a perfect right which is recognized as such by the neutral himself, and which, by the declaration of neutrality, whether tacit or express, made by the nation, to which by his hoisted flag, he confesses he belongs, he has spontaneously bound himself to respect. If, after this temporary stoppage, the cruizer proceeds to actual capture, and conducts the vessel as lawful prize, to his own shores, he acts according to the conventional (rather common and consuetudinary) law of war; and from that moment, becomes responsible for all the loss which may arise to the neutral, from his erroneous opinion of the legality of the prize. In all this conduct, says Lampredi, I find no injustice; because, if there be conceded to the belligerent, the right of sending out armed cruizers, for the purpose of preventing commerce in contraband goods, and the other transgressions of the law of neutrality, there must also be conceded to the exercisers of that right, the means, without which, it could not in any way be exercised; which are the visit and the arrest or stoppage at sea, and the subsequent capture for their legitimate adjudication.

The question, therefore, is reduced in the ultimate analysis, to know who ought to decide, whether the captor has judged well or ill? I say, continues Lampredi, that the practice of the European nations is just and consistent with reason; and that the sovereign of the captor ought to judge, when the prize is carried into his ports. The arguments which are adduced against this decision, particularly by Hübner, may be reduced to the following.

In the first place, says Hübner, the captured having been carried against their will, to the country of the captor, it cannot be presumed that they will submit with good will, to the jurisdiction of the capturing power; which, however, is necessary to create in them an internal and primary obligation to acquiesce and abide by the judgment of that power. But, continues Lampredi, in this passage Hübner introduces the rules of the civil law, which have no force whatever between nation and nation. Let us rise to principles. There is not in the state of nature, any man who has the least prerogative of jurisdiction and authority over another; and this is obtained only by the consent, express or tacit, of those who voluntarily subject themselves to it. It is the social compact alone, which gives the sovereign jurisdiction over his subjects. He delegates it to subordinate magistrates, who exercise it within the limits assigned them. And the men who are found within the assigned limits, are bound to obey the acts of jurisdiction done by that magistrate, not because they have subjected themselves by an explicit act of their own will, but because they have promised to obey the acts of the sovereign power, of which that of the magistrate is an emanation.* But if a man were thrust by force out of the boundaries of his own country, and it were attempted to bind him to submit to the acts of a magistrate, to whose jurisdiction, the public law, or the sovereign does not subject him, a

* In this paragraph, Lampredi appears to concede too much to Hübner. The theory which founds the civil rights and obligations of mankind upon an alleged social compact, and upon individual consents, agreements and promises, we have elsewhere shown, to be very exceptionable. They have a more stable foundation in the constitution of mankind, and in the circumstances in which they are placed, in necessity and general expediency. The correctness, however, of the doctrine, here unnecessarily conceded by Lampredi, does not effect the question he is discussing with Hübner.

violence would be done to him, and the acts of jurisdiction would be null, unless he submitted voluntarily, and thus in a manner purged the violence.

But although in the preceding hypothesis, the reflection of Hübner may be true, it is of no service, continues Lampredi, for proving the incompetency of the judge in the matter of prize. Here we are not treating of civil jurisdiction, and the competency of the judge in our case, must be deduced from other principles, than those of private jurisconsults.

The belligerent sovereign has the right to interrupt the navigation of the neutral, and to proceed to the visitation of his vessel, for the object before explained. But a sovereign, it is said, has no right to judge any but his own subjects; and here he exercises jurisdiction over the subjects of others. In this consists the equivocal or fallacy. He who sails in the vast sea, and is found in *territorio nullius*, is, strictly speaking, in the state of nature; and although he may be habitually and potentially the subject of his natural sovereign, nevertheless, actually, he is not the subject of any one. His flag, if it is displayed legitimately, declares him to be a neutral; and as such, he goes respected. If he does things, which belie the ensign he bears, there is no other law to regulate the reciprocal duties of him and the belligerent, but the immutable law of nature, which, when applied to nations, is called the *Jus Gentium*. Now, if the belligerent adjudges a company of men, who on the vast ocean, are not the subjects of any sovereign, to have violated the laws of neutrality, who shall have the right to render his judgment ineffectual and null? But he may from error or from malice, pronounce an unjust judgment. This is true. This, however, does not cause that there be in the world, a person, who has a right to declare it such, or to render it null; this his judgment,

being a sovereign act irresistible; and, consequently, not subject to the arbitrium of any one. The bad judge will render an account for his negligent or malicious conduct to the author of the law of nature; but, externally at least, he must be regarded just by all those who have no interest in the matter, and by those who suffer from it no hurt, damage and wrong; and there is no other remedy than the prevention of the evil by pacific measures, and in case of denial, by war.

Now cruizers are no other than the executors of the sovereign right. They visit the neutral vessels; and if they find them in part, or in whole, liable to confiscation, they carry them to undergo the judgment of the belligerent, who finding the fact against them, would have the right to pronounce it. What wrong do they commit against the law of nations? They commit a wrong, answers Hübner, against a sovereign nation, which is not subjected to the jurisdiction of a foreign power in the places of its dominion, nor in those which do not belong to any one. But we reply, that a small company of men, who are found in a marine vehicle in the free and open seas, are not a sovereign nation. They do wrong, says Hübner, to the navigating subjects of the sovereign, whose flag they display; over whom the belligerent sovereign assumes a jurisdiction which he has not, except over his own proper subjects. In answer, we have already observed, that these navigators are not, in the vast ocean, in reality the subjects of any sovereign.

But let them be supposed to be subjects of the neutral power, as is pretended. I have already said, continues Lampredi, that if the cruizer has made a capture of the vessel capriciously, and without any reason, he ought to be condemned in all the damages and expenses. Let us now suppose that the capture is lawful. A cruizer,

the minister and executor of the rights of the belligerent sovereign, finds a vessel which he judges to have violated the laws of neutrality. This is an infringement of the rights of the belligerent, and an injury for which he may immediately claim reparation. And what new and strange doctrine would there be introduced into the law of nature, were it to be held, that not the injured party himself, but the sovereign of the person who has done the injury, and other foreigners, ought to judge both of the reality and the extent of the injury? Would not this be the same as depriving sovereigns of their natural independence? If, then, the subjects of a friendly power do me a wrong, or an injury, and I have an easy mode of securing reparation for it, having the injuring party within my power, must I abstain from taking the reparation due, and be content, that the friendly sovereign shall first judge whether the injury be actual or true, or shall I, who have no judge of my actions upon earth, wait the judgment of foreigners? The quality of subject, in short, neither alters nor diminishes, in any way, the right of the belligerent; since between or among persons, who live in the state of nature, the judgment, both as to the reality of the injury, and the quantity of reparation, is left to the arbitrament, to the discretion of the injured party, not to that of the wrong doer.

The doctrine, we maintain, holds good, also, continues Lampredi, if we choose, by a false hypothesis, to regard the neutral vessel, as the sovereign nation, of which it displays the colours. On this hypothesis, the case to be treated of, would be that of an injury done by one nation to another nation; and, there being no competent judge between, the conclusion would again be, to establish, that to the arbitrament or discretion of the injured nation must be left the judgment of the reality,

quality and quantity of the injury, and of the quality and quantity of the reparation, which it may deem necessary, both to compensate the present damage, and to prevent the danger of its being incurred in future. In whatever light, therefore, the present question may be viewed, the solution will be found the same; and it must be admitted, that the legitimate judges of prizes are those appointed by the practice of the nations of Europe, who observe in this department the strictest rules of moderation.

All the other objections, continues Lampredi, which Hübner states against our doctrine, turn upon the want of jurisdiction in the sovereign of the captor, deduced from the persons and the place where has occurred the pretended offence of violating the laws of neutrality. But the answer is easy; that, when once the injured party has a right to be the judge of the injury done to him, it is of little importance, what may be the place, what the persons, where, and by whom it may have been committed; that, consequently, the rules for the exercise of the ordinary jurisdiction, good for the regulation of civil society, have no place, when we treat of persons, who are in the simple state of nature, such as are sovereign nations in relation to each other.

There exists the same fallacy in another argument which this writer deduces from the common rule, that no one can be both judge and party in contraverted causes; which is most true, in a legal question contested in the ordinary course of social life; but which cannot be pleaded, or founded on, when treating of persons who live in the state of nature, as are the captors and the captured on the high seas, or on the supposition of Hübner, that both represent their respective nations, as are the belligerent nation, and the neutral nation, who have no judge upon earth, and of whom, each is natur-

ally the judge both of the reality and the quantity of a supposed injury.

The single just reflection, continues Lampredi, which the author before cited, makes upon the judges of prizes, is, that they are bound to pronounce sentence, according to the marine ordinances on cruizers and privateers, or other declarations of their sovereign, and that, consequently, they must take as the basis and guide of their judgments, the particular legislation of their native country.

From this, however, it does not follow, that they are incompetent, and that sometimes they may be forced to be unjust internally, although externally most just. Sovereigns sometimes, misled by their ministers, or deceived by persons who have more at heart their own private interest, than that of the public, may make such regulations for the conduct of their cruizers and privateers, as are contrary to the rules of the law of nations, and infringe the rights of peaceful and neutral states.

Against those regulations, sovereigns themselves ought to reclaim, and use all those means which the public reason of nations approves, to protect themselves from violence and injustice. And when the belligerent will not be prevailed on by peaceful measures, to temper his regulations, and to reduce them to the rules of equity and moderation, commanded by the law of nature; and in the collision of rights, refuses to repair the wrongs, and make good the losses which result therefrom, to their subjects, neutral sovereigns have no other remedy but force, and of course, war.

But this does not render the method of adjudicating prizes unjust. A sovereign may prescribe the most unjust law for regulating the actions of his subjects; but his right is not on that account less just, to constitute judges and magistrates, who may judge according to

the tenor of the laws prescribed by him. To maintain that the appointment of courts of law or tribunals, judges and magistrates, is not a right of sovereignty, because it may sometimes happen that a law made by a sovereign may be unjust, or not calculated to produce the good which was contemplated, would be a gross error, subversive of the foundation of civil society.

Nor does it appear to me, continues Lampredi, that there is validity in the objection, that the judges appointed to determine the lawfulness of prizes in the country which is interested, may, either from the spirit of patriotism, or from private views, to favour their cruizers, be, in the greater number of cases, unjust. Besides being able to make the answer we have before made, to the objection of the tribunals of the belligerents being *exparte* judges, if this danger were sufficient to exclude the judgment of others upon our affairs, there would not be a case which might not be legitimately withdrawn from the judgment of a court or magistrate, even in civil life; because there is not a case on which the risk of a sentence, being unjust from private views, does not occur.

We have thus thought it right to give at considerable length, the reasoning of Lampredi, in support of the legal competency of the courts established by the different Maritime states of Europe, for the adjudication of prizes, as exhibiting the views entertained at the time he wrote, in the south of Europe. His reasoning, however, on this subject, does not appear to us, to be so strong as it might have been, or so convincing or conclusive as his reasoning, generally, in the previous sections. And on the point of the technical competency of these courts, we are more disposed to coincide in the views of Dr. Rutherford before recited, and of M. Tetens, to be afterwards noticed.

Lampredi concludes with a review of the work of the Abbate Galiani, which may form a proper addition to the notice we have already given of that unilateral or *exparte* treatise.

The counsellor Galiani, has followed in substance the doctrine of Hübner; but has made several distinctions which had not occurred to the Danish writer; and says, that if any doubt exists with regard to the lawfulness and verity of the patent and flag of the neutral vessel, when arrested, the judgment belongs to the sovereign of the captor; but that in every other controversy, either respecting the contraband nature or hostile property of goods, or any other violation of the law of neutrality, the captured ought to be judged by their own sovereign.

In the first proposition, says Lampredi, I fully concur; because it forms part of the general theory before expounded, that the belligerent sovereign is naturally the judge of all the prizes, which, for any cause, his armed cruisers bring within those parts of the sea, which are territorial, or occupied by the state.

With regard to the second proposition, Galiani again distinguishes the case of contraband goods, from that of hostile property, found on board neutral vessels. In the second case, he decides at once, at a dash, that it is a notorious injustice to capture the goods of the enemy found in neutral vessels; and that, consequently, a manifest injustice is not subjected to any judge. We have elsewhere, continues Lampredi, treated this matter, and refer to what was there said. Upon the first case, contraband, Galiani repeats one of the arguments of Hübner, reasoning thus. The judicial cognizance of contraband, belongs, by public reason, to the sovereign upon whose territory the arrest takes place; but every vessel on the open sea continues to be the territory of that sovereign,

from whom, in legitimate form, it has obtained the patent of navigation; therefore, the judicial cognizance belongs to the sovereign of the captured vessel. We have elsewhere, continues Lampredi, demonstrated the falsity of this second proposition, or of the minor of this syllogism, which consequently becomes inconclusive, and does not merit any farther discussion. Falsity or error, leads, of necessity, into a thousand intricacies, to extricate himself from which, one knows not how to find the way. Indeed, Galiani himself was aware that there existed the greatest difficulties, in carrying this, his theory, into effect. The belligerent cruizer arrests, on the open sea, a neutral vessel, and conducts it to a port of his nation. How is the sovereign of the neutral to take cognizance of the controversy? Must both parties appoint procurators in the courts of law of the neutral sovereign, which may sometimes be five hundred leagues distant, and send the documents which may be necessary to prove their cause? or must the neutral vessel be sent back to its sovereign, that he may judge of it under his eye? The first remedy is of enormous length, and involves a discussion protracted for such a time, that from the waste of the neutral vessel, and the decay of the cargo of goods, in the interval, it will, upon calculation, be found always more advantageous to deliver up the disputed contraband, than to await a judgment, which, however favourable, will ruin the owner of the arrested neutral vessel. The second remedy, also, is subject to so many difficulties, that Galiani does not propose it, but rather resorts to the expedient of delegating the jurisdiction of the neutral sovereign to his consul, resident in the port into which the vessel has been brought, to whom may be given the faculty of taking two or more intelligent assessors, by whose advice he may decide the controversy. Thus, to avoid the danger of injustice on

the one side, he incurs the danger of the same injustice on the other. Thus, after having declaimed much on the incompetency of the tribunals of the belligerent parties, by assuming that they exercise jurisdiction over the subjects of others, there is held out as legitimate, the jurisdiction which the neutral sovereign arrogates to himself, over the owner of the cruizer, who is not one of his subjects, and who is thus forced to abide by the judgment of a foreign judge, pronounced in the territory of his sovereign. Thus it is permitted, that in this same territory, a foreigner shall exercise acts of command, obviously quite in disconformity with the law of nations. Thus, finally, to avoid the absurdity of the belligerent being a judge *exparte*, he falls into the same absurdity on the other side, and admits that the neutral shall be so without the difference, which Galiani finds between the interests of either of these judges, being such, as to afford ground for applauding much, the preference of impartiality, which, in this contrast, he gives to the judgment of the neutral, who, in reality, has it as much at heart to animate his subjects to navigation and commerce, by affording facilities by connivance, and by favour, as the belligerent has to encourage his subjects to expose their lives and their properties, in order to diminish the strength of the enemy, by the hope of reward.

Lampredi proceeds to treat of the second part of the question proposed, what is the determination of the law of nations with regard to judgments on the legitimacy of prizes, carried along with the captor, either by vis major, such as tempestuous weather, or voluntarily into ports belonging to, or seas occupied by, a neutral sovereign?

This question, continues Lampredi, is easily solved, by means of the principles of reason before expounded.

A vessel armed for war, or privateer, and as such received into a port, roadstead, bay, or other part of the sea, occupied by a neutral sovereign, preserves its character; and the commander, although in a foreign territory, preserves, with regard to the government of the vessel, and all its dependencies, the authority which the law of nations, and the laws of the sovereign, of whom he is the minister in war, have conferred upon him. Nor, in exercising this command, does he do any injury to the sovereign of the neutral port, who, as such, has been pleased to receive him.

If, then, a belligerent cruizer enters a neutral port, with one or two prizes, captured from the enemy, or from other neutral nations, in consequence of the commission and power granted to him by his sovereign, the neutral sovereign has no right to set himself up as a judge of their legality; both because the captured vessels, on board of which, the privateer has hoisted his flag, have become a dependency on his ship of war, over which he alone, by the acquiescence and tacit consent of the neutral sovereign, exercises jurisdiction or command, and also because the neutral sovereign has promised not to engage in the operations of war, by one of which the pretended prizes have become the property, or at least passed into the possession of the cruizer. He ought, therefore, to respect this possession, leaving it to the judges appointed by the sovereign of the captor, to declare it either lawful or unlawful; and thus either to liberate the captured vessel or cargo, or to adjudge the property thereof to the captor; provided this judgment is pronounced out of the territory of the neutral government, where no one can exercise rights belonging exclusively to the supreme power. The right, therefore, which Galiani here asserts, is unfounded, and the project which he proposes for the adjudication of prizes

could not be executed, without the infringement of sovereign rights.

On the other hand, Lampredi recognizes the following doctrine, p. 232. Whoever comes within the territory of a state, and founds his action or complaint upon a law of its sovereign, is bound to wait the decision of those judges whom the sovereign has appointed to preserve, protect, and learnedly interpret his laws. When the question is respecting an alleged delinquency, and the supposed delinquent is one who has violated the laws of its sovereign, it is consistent with common reason, that he should be acquitted or condemned, by the judges appointed by that sovereign, although the offence, or supposed violation of the law, may have commenced without the territory. Provided the offence is completed or consummated within the territory, and the accused is found present there, he ought legally to undergo the judgment of the sovereign of the place; there being in this case, a merely civil judicial (criminal) investigation and decision between the supposed guilty person and the accuser; and there being no question of the general law of nations, but simply of private law, to the cognizance of which, the rules of the public reason of nations are not applicable. Accordingly, the commander of a privateer, who, for example, conducts a neutral prize into a port, and who is accused of having violated the neutrality of the state, whose territory he has entered, cannot evade the jurisdiction of the place, by pleading his quality of not being a subject, and his privilege of being the captain of an armed ship of war; because the one does not protect him from the jurisdiction of the *Locus Delicti*; and the other gives him, it is true, the faculty of exercising military command over his vessel, but does not liberate him from the jurisdiction of the territory, with regard to all acts, injurious

or criminal, according to the laws of that territory. There is also another case in which the sovereign of a neutral port may lawfully exercise his jurisdiction over a cruizer, who has conducted thither neutral, and also hostile prizes; and that is, when the captured master, either by himself, or by his lawful procurator, craves the sovereign authority against a sort of pirate, who has falsely assumed the flag of a belligerent power, and has perpetrated acts of hostility without lawful authority, and letters of marque. It is clear, that in both these cases, there ceases all the regard otherwise due to belligerents and their cruizers, in virtue of the adopted neutrality; nor can the accused enjoy it, until he has legitimated his person, and purged the accusation. This judicial inquiry into the state and legal authority of the pretended privateer, must be made before, or in the courts of the sovereign of the port, who, being under the obligation of defending all persons dwelling in his territory from all injury, hurt, damage, or wrong, and of punishing all criminal acts, whether begun or continued within the boundaries of his jurisdiction, ought, of necessity, to enjoy all the rights, without which he cannot fulfil this his obligation. Nor can the neutrality adopted, impose any restraint upon the exercise of these rights, since it regards only the belligerent nations, and their legitimate ministers in war, not pirates and sea robbers, and those who usurp, to the damage and injury of others, an authority which they have not.

CHAPTER X.

OF MARITIME INTERNATIONAL LAW, CHIEFLY DURING WAR,
FROM THE COMMENCEMENT OF THE WAR OF 1793,
TO THE PEACE OF AMIENS, IN 1801—2.

WE have now terminated our account of the progress of Maritime international law, during the period between the war of 1756, and the war of 1793. And we have concluded that account with copious extracts from the excellent work of Lampredi; who, while he devotes the second part of his work to the Maritime conventional law of nations, properly so called, by giving a collection of extracts from the Maritime and commercial treaties, which had been entered into by the different European nations, down to the year 1788, and then in force, gives in the first part, as we have seen, although he sometimes vaguely calls it conventional, a full exposition of the natural and primary, or general, common, and consuetudinary law of nations, during war, tracing its doctrines to their foundation in the juridical relations of states, as separate independent communities, composed of men united in civil society. Indeed, his treatise is one of the latest, if not the last work, in this department of law, which appeared during the eighteenth century, of a scientific or philosophic character, in which the doctrines of Maritime international law are not only traced to their foundation, but fairly and impartially

investigated and discussed without any national bias, and still more without any bias from interested motives. For from the middle of the eighteenth century, and still more during the period we are now to survey, most of the treatises on Maritime international law, were composed by jurists, expressly employed to advocate particular doctrines, as conducive to the commercial interests of particular states, or particular descriptions of states, pacific or belligerent, or are of a controversial character, from the authors, although not expressly employed to advocate particular doctrines, being so much under the influence of national biases, which, though excusable, inasmuch as they may be patriotic, are not admissible at the bar of reason, or on the calm investigation of truth.

SECTION I.

IN surveying the state of Maritime international law, during the short, but momentous period, which elapsed from the commencement of the maritime war of 1793, to the peace of Amiens in 1801, we shall, as on former occasions, keep in view the different sources or records of that law, namely, 1. the works of individual jurists; 2. the statutes or sovereign ordinances, proclamations, and notifications, and the reports of judicial determinations, as exhibiting the administration of that law, by the different states; 3. the treaties or conventions among nations, as repealing, or altering, or renewing previous conventions, or as modifying the general common consuetudinary law. But to the treatises of individual jurists, which appeared during this period, on the subject of Maritime international law, the remark we have made of their being of an *exparte* and controversial nature, is, with a few exceptions, peculiarly applicable. And the actual state, progress, or rather, perhaps, retro-

grade movement of Maritime international law during this period, is perhaps to be found, not so much in the treatises of jurists, as in the practical administration of that law by the governments, and judicial tribunals of the different European nations, as recorded in the statutes, ordinances, and decrees of these governments, and in the reports of the decisions of their tribunals. We shall, therefore, commence our survey of the period from 1793, to 1801, by noticing merely such treatises, during that period, as are not of a controversial nature, and then proceed with the practical administration of Maritime international law by the chief maritime states, reserving, thereafter, to notice the *exparte* treatises before alluded to.

Of the excellent, but unfortunately too brief, discourse of Sir James Mackintosh, on the law of nations generally, and of the interesting work of Mr. Ward, on the History of the law of nations, before the age of Grotius, which both appeared during the period we are now contemplating, we have elsewhere recognized the great merits. And the other treatises of importance, which appeared during this period, and are not of a controversial nature, seem to be the *Essai* by M. de Martens, *concernant les armateurs, les prises, et les reprises*, published in 1795, and the large work of the Neopolitan lawyer, Michele de Jorio, entitled, *La Giurisprudenza del Commercio*, published in 1799.

G. F. Von Martens, a native of Hamburgh, was from 1783, to 1808, professor of law in the University of Göttingen, and afterwards Westphalian councillor of state, and Hanoverian privy councillor. And the treatise before mentioned, is among the best of his numerous and useful works. But as it was translated into English in 1801, by Mr. Hartwell Horne, it may be unnecessary here to give a detailed account of it.

In his first chapter, entitled, *Histoire des Armateurs*, he gives an interesting and really philosophical history of privateers. In chapter II, entitled, *Droits Modernes des Armateurs*, he treats of prize law, and gives a brief, but very distinct account of that law, as recognized and observed in Europe, in 1795. Thus, § 10 to § 19 inclusive, the sovereign alone has the right to grant letters of marque, or commissions, as privateers, to merchant vessels. The subjects of one state are not at liberty to take letters of marque from a foreign power, without the permission of their sovereign. It is not lawful to take such commissions from two sovereigns. The owners of the privateer must give security for good conduct, and exhibit the instructions given by them to the captain. Letters of marque authorize privateers to attack and capture the vessels and cargoes of the enemy; but direct them not to do any damage to friends; authorizing them, however, to visit, and in certain cases, to seize vessels carrying neutral flags. Privateers may visit and seize the vessels and cargoes of the enemy, as well within the maritime jurisdiction of the enemy, as in the open sea, or in the sea ports subject to the enemy; but may not pursue prizes into rivers belonging to the enemy. In the places before mentioned, privateers encountering a hostile vessel, may summon her to surrender, engage, capture, and bring the vessel into a port of his country, to be adjudged as lawful prize. The three succeeding sections, it may be right to quote.

§ 20. S'il rencontre un où plusieurs navires marchands, portans pavillon ami, il ne doit d'abord s'en approcher, que jusqu' à la portée du canon; et en tirant un coup, sans balle, qu'on appelle la semonce, sommer le navire à amener, et, s'il le peut, à jeter l'ancre. D'après les traités et l'usage, le navire marchand est obligé de céder à cette sommation, et de subir, en cas

de besoin, la visite de sorte, que, s'il tente à fuir, il est permis de lacher une boulée contre lui, pour le ramener à la raison, et s'il s'avise de faire defense, en tirant sur l'Armateur, ceci seul suffit, pour le faire condamner comme bonne prise; supposé même, qu'il puisse ensuite prouver la neutralité du navire, et de la cargaison. Quant à la visitation même, il y a aujourd'hui une difference à faire, entre les navires marchands naviguant sous un convoi, et ceux qui naviguent seuls. Quant aux premiers, d'après un usage qui semble, ne s'être formé, que depuis les deux dernières guerres de l'Amérique, et qu'on trouve établi par les conventions et les ordonnances les plus recentes, l'armateur peut tout au plus envoyer quelques uns de ses gens sur le vaisseau de convoi pour y examiner les papiers, qui constatent la neutralité, du convoi, et des vaisseaux convoyés, et leur cargaison, là où suit le principe, que le navire ne couvre pas la cargaison. Si ces papiers en font preuve suffisante, toute visitation ulterieure des vaisseaux doit cesser, lorsque l'officier, qui commande le convoi donne sa parole d'honneur, qu'il n'y a point des marchandises confiscables sur ces vaisseaux.

§ 21. Si le navire rencontré navigue seul, l'armateur est autorisé à le visiter; à cette fin il doit lui envoyer, une chaloupe avec quelques hommes, dont le nombre est fixé dans la plupart des traités, à deux ou trois; lesquels, après avoir abordé, se font montrer par le capitaine les papiers, qui constatent, 1. le lieu d'où vient le vaisseau, et le port pour lequel il est destiné; à quoi sert surtout le passeport, dont chaque capitaine doit se munir avant son depart. 2. La neutralité du navire, du capitaine, et de la majeure partie de l'équipage; au premier point servent les certificats du magistrat du lieu d'où le vaisseau a mis en mer, sur la neutralité du navire et du capitaine, s'il est de construction neutre, et les

contrats de vente, passés devant juge, s'il est de construction ennemie; la neutralité de l'équipage se prouve par le rôle d'équipage. 3. La qualité de la cargaison, qu'il n'y a point des marchandises de contrebande, et en tant, qu'on ne suit pas le principe, que le navire couvre la cargaison, que la cargaison n'est pas la propriété de l'ennemi. C'est à quoi servent les charteparties, les connoissemens, et les attestations du magistrat du lieu, d'où le navire est parti, du serment prêté à cet egard, par le capitaine, et par les fretteurs.

Lorsque toutes ces pieces sont en regle, et qu'il n'y a point de soupçon de faux, les officiers de l'armateur sont obligés de se retirer, sans proceder à aucune visitation ulterieure, et doivent laisser le navire continuer paisiblement sa route, en lui pretant même toute sorte d'assistance, dont il pourroit avoir besoin.

§ 22. Mais il n'en est pas de même, si, comme il n'arrive, que trop souvent, l'armateur, a force d'examiner, trouve ces preuves insuffisantes, soit en tout, soit en partie. C'est ce qui peut avoir lieu, sous un multitude de pretextes, dont les suivans sont autorisés par les loix, et par le sens des traités. 1. Si le navire ou vaisseau de guerre a des doubles lettres de mer, les unes de puissances amies, les autres de l'ennemi, ou s'il engage le combat sous un autre pavillon, que celui du souverain, dont il tient sa commission. Dans ce cas, il est permis d'amener la prise, pour la faire adjuger à l'armateur. Il le peut de même, 2. si le navire se trouve depourvu de lettres de mer, surtout, s'il les a jetté en mer, lors de l'approche de l'armateur; ou si l'armateur est depourvu de lettres de marque. 3. Si les lettres de mer font voir, que le vaisseau est ennemi, ou qu'il est chargé en tout, ou en partie, de marchandises de contrebande, ou bien là, où on a egard à la propriété de la cargaison, que les marchandises sont en tout, ou en partie, la propri-

été de l'ennemi, et que le capitaine ne veut pas lui abandonner les marchandises sujettes à confiscation, ou qu'il ne peut les recevoir ; et de même, si les lettres de mer font voir, que le vaisseau est destiné pour une place, dont le capitaine devoit savoir, que tout commerce avec elle est défendu. Enfin, 4. lorsque, malgré la teneur de lettres de mer, il y a des doutes fondés contre leur authenticité, ou leur sincérité, surtout, si les lettres de mer ne sont pas signées, ou si le vaisseau suit une route différente de celle, qu'elles indiquent, sans pouvoir en alléguer une raison justificative ; c'est alors qu'on ne peut refuser à l'armateur, ou de conduire avec soi la prise, ou de se faire ouvrir par le capitaine ou les gens du navire, les caisses, tonneaux, &c., qu'il soupçonne renfermer des marchandises sujettes à confiscation, et dans le cas, où il en trouve, de conduire avec soi la prise. Cependant ainsi qu'en général, il est défendu, aux armateurs d'user de violence sur les vaisseaux, qui se soumettent à la visitation, ainsi il leur est très rigoureusement enjoint, que lors même qu'après avoir exigé du capitaine les lettres de mer, ils jugent qu'il y a lieu à confiscation quelconque, ils ne s'avisent point de rompre les écoutilles, les mâles, ballots, &c., d'enlever quelque chose du navire, ou de commettre d'autres dégâts, sous peine de perdre leur part au butin, de faire restitution du triple ou quadruple, de perdre leur place, leurs lettres de marque, &c. et de même qu'ils empêchent leurs gens de piller, et de commettre des désordres sous peine d'en être responsables. Ils doivent, bien, au contraire, après avoir, en présence du capitaine de la prise, fait dresser, par l'écrivain, un procès verbal de circonstances de la prise, en faire un inventaire sommaire, se saisir des clefs, fermer les écoutilles, et surtout mettre le sceau à toutes les lettres de mer de la prise, en présence du capitaine, en lui en donnant un reçu ; et s'ils

se voient engagés à transporter une partie de la cargaison sur le vaisseau armateur, ce qui ne doit avoir lieu, qu'en, cas de nécessité, ils doivent le faire, en presence de l'écrivain et du capitaine, qui en obtiendra un reçu."

In a note to this Section, Martens observes with justice; "une malheureuse experience ne fait, que trop voir, jusqu' à quel point souvent ces examens approchent de la chicane; de l'autre coté pour juger impartialement de la conduite des armateurs et de celle des puissances belligerantes, on doit se souvenir aussi à combien de fraudes, les sujets de certaines puissances neutres ont eu recours, pendant les dernières guerres maritimes, pour tromper la vigilance des armateurs; que des sujets de certains états neutres faisoient metier de couvrir la propriété des navires, et de la cargaison ennemie, moyennant des contrats de vente simulés, en se faisant payer leurs faux sermens de quelques pour cents. Peut on demander, raisonnablement, aux puissances belligerantes, qu'elles soient la dupe de ces fourberies. Malheureusement l'innocent souffre pour le coupable."

§ 23. The ransom of the goods of the enemy is now generally declared illegal. § 24. When the captor claims only part of the cargo, he must release the neutral vessel, unless his vessel is not capable of containing the goods, or these goods, as being contraband, may involve the confiscation of the vessel. § 25. If the captain of the captured vessel refuses to deliver the part of the cargo claimed by the captor as contraband, or the vessel of the latter is not capable of containing these goods, or if the captor claims the whole cargo, or the vessel itself, the captor may conduct the prize into any of the ports of his sovereign, generally to the port at which he obtained his commission.

In § 26, § 27, § 28, and § 29, the author treats of the procedure upon the arrival of the prize in port, of the

claim by neutrals, of judicial process in the first instance, of the appeal, and of the claim for the condemnation of only a part of the cargo. In § 30, to § 34, inclusive, he treats of expenses and damages, of the distribution of the prize or its proceeds, of the exchange and ransom of prisoners, of the remuneration of privateers, and of prizes made by continental troops, or in sea ports.

In § 35, Martens treats of prizes made by collusion, and makes the following remark. "Sans parler des collusions frauduleuses avec les sujets de l'ennemi, qui ont lieu, tant qu'il ne pas défendu à ceux-ci, de se rançonner à la charge des propriétaires du navire, une des collusions, souvent le plus directement contraires aux vues du souverain de l'armateur, c'est celle, où en vertu d'un arrangement secret, avec des sujets ennemis, auxquels tout commerce est défendu avec nous, en tems de guerre, ou même avec des sujets neutres ou amis, on fait servir une prise simulée de prétexte, pour transporter des marchandises ennemies, ou prohibées dans nos ports." He adds in a note, "Je dis souvent; car il est des cas, où le souverain de l'armateur, s'il manque d'objets, qu'il n'est pas permis aux vaisseaux neutres de lui porter directement, verroit avec satisfaction une collusion entre ceux-ci, et les armateurs, afin qu'une feinte prise colore un procédé contraire à la neutralité, et procure au souverain belligerant, ce dont il manque le plus. Il ne seroit pas difficile, d'appuyer ceci d'exemples tirés de la guerre actuelle."

In § 36, and § 37, the author treats of the cases when the prize is carried into a foreign port, and of the judgment in such cases. And here, even with all his attention to correctness of statement, it appears, M. de Martens sometimes trusted to doubtful authorities. For here, on the authority of Galiani, he states, in 1795, that the English consul at Leghorn, had the power of

adjudicating English prizes made in the Mediterranean, subject to appeal to the commissioners of the king, whereas in 1788, no less an authority than Professor Lampredi of the University of Pisa, had shown that this statement of Galiani was made at random, and was untrue.

In his Chapter III, entitled, *Des Reprises*, Section I, we cannot agree with M. de Martens in his theory of the non-transference of property in prizes during the currency of the war, or in other words, the continuance of the *Jus Postliminii*, both in relation to fellow-citizens or subjects, and to foreigners or neutrals, till the termination of wars by treaties of peace. But, in Section II, he gives an apparently correct account of the practice of the different European nations, in cases of recapture, both with regard to subjects and allies, or neutrals, so far as any provision had been made by special treaties, or otherwise, with regard to the latter.

JORIO.

The other principal systematic, and not merely controversial writer on the Maritime law of nations, during the short period we are now surveying, is Michele de Jorio, formerly mentioned.

The Neapolitan or Sicilian government had, we formerly saw, been induced to employ the Abbate Galiani, in 1782, to write in support of the new doctrines of neutrality. And, as was to be expected, the learned Neapolitan lawyer, Michele de Jorio, in his large work, entitled, *La Giurisprudenza del Commercio*, published in 1799, four volumes, quarto, adopted in this department, somewhat similar views, from a natural, and not unpraiseworthy patriotic regard for what he believed to be the interests of his own country; resting, however, the maritime rights and obligations of belligerents and

neutrals, not as Galiani, ultimately, did upon the honour and generosity, but upon the justice of nations, upon the principles not of ethics or morality, but of legality. In the nineteenth title of his second book, volume I, p. 438, Jorio inquires whether goods of all descriptions may be transported by neutrals to the territories of states, that are at war with each other. In title twentieth, he inquires what is the description of law, according to which this question is to be resolved or determined, distinguishing the universal law of nations, the conventional law of nations, as established by treaties, or the European law of nations founded upon general customs. And in these two titles, he adopts very much the views of Totze, the reputed author of the "*Essai sur la liberté de la navigation et du commerce des nations neutres pendant la guerre*," and of Hübner. In title twenty-first, he inquires what goods cannot be carried by neutrals to belligerents, according to the universal law of nations; and after pointing out the differences of jurists in their enumeration of contraband, concludes, that the rules given by them, are not founded upon a constant and invariable principle, since the disputes on this subject still continue; but rather approves of the distinctions made by Grotius, and considers that distinction as the commencement of the analysis of the general maxim of holding as contraband, what aids the enemy in offensive war, in occasioning hurt or damage, and excluding everything which has not that tendency.

In title twenty-second, he inquires what goods cannot be conveyed by neutral to belligerent nations, according to the conventional law of nations, and gives the specifications contained in a number of particular treaties. In title twenty-third, he gives the Neapolitan law of contraband. In title twenty-fourth, he inquires what goods cannot be carried by neutrals to belligerents, ac-

according to the European law of nations, as founded on custom and usage. And, in proof of these customs and usages, he adduces the numerous treaties which have been concluded among the European nations; but without correctly distinguishing how far such treaties are available in law, from their affording evidence of such general consuetude; as to be generally obligatory, or beyond the contracting parties. In title twenty-fifth, he inquires how far it is lawful for neutrals to carry goods to besieged cities or blockaded ports. In title twenty-sixth, he treats, and evidently approves generally, of the doctrines of the armed neutrality of 1780, to which confederacy his government had acceded.

SECTION II.

Of the practical administration of Maritime international law, by the chief Maritime states, from 1793 to 1801.

FRANCE.

IN France the sweeping changes, and almost total subversion of the ancient internal institutions of the kingdom, could not fail to affect the administration of Maritime international law. And we have a pretty distinct account of the judicial proceedings in the French courts of prize during that period, in the "Code des Prises Maritimes," published by Citizen Guichard, in the seventh year of the Republic; in the "Decisions du Conseil des Prises," published from time to time in quarto; and in the notes by M. Bonnemant, translator of the "Trattado sobre las Presas" of the Chevalier d'Abreu, published in the tenth year of the Republic, as well as in the "Code des Prises," published by Dufriche Foulaine, in 1804, and dedicated to the Arch-Chancellor Cam-

bacerés; and in Martens' "Recueil des Traités," Tom. VI. p. 752—776.

That the revolutionary government of France was guilty of a gross departure, in several instances, from the previously recognized rules of Maritime international law during war, there can be no doubt. Thus, by the decrees of the national convention of the 26th May, and 11th August, 1794, it was ordered, that no more Englishmen, Hanoverians, or Spaniards, should be made prisoners. These decrees, however, were recalled on the 30th December, 1794, as contrary to the law of nations, and of war; and because it is believed the military forces of the Republic, both by land and sea, refused to carry them into execution.

M. Büsch having alleged that the constituent assembly of France had passed a decree, by which it resolved to abolish "*tous les armemens en course*," all privateering expeditions, M. Martens states he had never been able to discover any evidence of such a decree; and adds, "*Supposé qu'en France, on eut eu serieusement l'intention d'abolir les armemens en course, au moins ce projet philanthropique a été bientôt abandonné; et les décrets, qui suivent, font voir, combien successivement la France a renchéri même sur la conduite, que ses ennemis se sont permis de tenir, envers les vaisseaux neutres.*"

On the 14th February, 1793, the national convention merely continued the ancient laws concerning prizes. On the 9th May, 1793, the convention decreed, that all neutral vessels, loaded, in whole or in part, with goods belonging to the enemy, or with provisions belonging to neutrals, but destined for the enemy, should be seized and brought into port; that the former goods should be declared lawful prize, and that the latter should be retained, but paid for, on the footing of their value at the port to which they were destined.

On the 8th July, and 22d November, 1796, the executive directory issued a decree, intimating to neutrals, that, with reference to visit, seizure, and confiscation, they would be treated by the French cruizers in the same manner, as they allowed themselves to be treated, by the enemy, (the English.)

In October, 1796, the following resolution of the council of five hundred was approved of by the council of ancients. "L'importation des marchandises manufacturées provenant, soit des fabriques, soit du commerce Anglais, est prohibée tant par mer, que par terre, dans toute l'étendue de la République Française. Aucun bâtiment chargé, en tout, ou en partie, des dites marchandises, ne pourra entrer dans les ports de la République, sous quelque prétexte que ce soit, à peine d'être saisi surlechamp. * * * La condamnation emportera toujours confiscation des marchandises, batimens de mer," &c.

In March, 1797, the executive Directory passed a decree, authorizing, inter alia, French cruizers to stop and bring into the ports of the Republic, such neutral vessels as they should find loaded, in whole or in part, with goods belonging to the enemy; declaring such goods to be good prize, and directing them to be confiscated for the profit of the captors, but directing the neutral vessels to be released, upon the delivery of the hostile goods, with payment of freight, and indemnity for their detention.

In January, 1798, the council of five hundred, upon a message from the executive directory, and the council of ancients, adopted the following resolution. 1. "L'état d'un navire, en ce qui concerne la qualité de neutre; ou d'ennemi, est déterminé par sa cargaison. En conséquence tout bâtiment, chargé, en tout, ou en partie, de marchandises Anglaises, est déclaré de bonne prise;

quelque soit le propriétaire des dites marchandises. 2. Tout bâtiment étranger, qui, dans sa traversée, aura relâché en Angleterre, ne pourra entrer en France, si non dans le cas d'une relâche forcée; il en sortira, des que les causes de sa relâche auront cessées." Martens' Recueil, Tom. VI. p. 775. And this law was not abrogated till the law of 23 frimaire an. 8, which made way for the revival of the milder regulation, adopted by the monarchical government in 1778, which released the neutral vessel, unless the cargo was contraband to a considerable amount. See Decisions du Conseil des Prises, Statira 5. Thermidor, an. 8, in which the neutral vessel was released, but without freight or other indemnity.

In 1798, the worthless Bertrand Barrère, some years after his fall, and apparently with the view of obtaining pardon for his crimes, or favour from the Directory, published a book, entitled, "La Liberté des Mers, ou le Gouvernement Anglois dévoilé," in two volumes, octavo. But this work does not appear to have made much impression, or to have produced any material effect at the time. It cannot be ranked with works of science on the Maritime law of nations. It does not even deserve a place among the polemical pamphlets on the subject, before alluded to, as having been so frequent on the continent, during this period. It has lately been not inappropriately termed, "a bulky libel on England." And any thing like argument in this book, we shall have occasion to notice, in afterwards reviewing a later, and much more respectable French work, bearing the same title of "La Liberté des Mers," by M. de Rayneval.

The revolutionary government of France appears also to have made great changes in the courts, to which the adjudication of prizes was committed; and the regulations appear to have varied much, and not to have

been very consistent. In virtue of the law of the 14th February, 1793, as interpretive of that of the 16th August, 1790, on the judiciary department of the constitution, the jurisdiction in prize causes belonged, in the first instance, to the tribunals of commerce; and questions and disputes of this nature were, like others, carried by appeal, before the ordinary higher tribunals. In the month of Brumaire an. II, Oct. 1794, the national convention decreed, that all disputes which had arisen, or might arise, on the validity, or invalidity of prizes, made by privateers, should be decided, *par voie d'administration par le conseil executif provisoire*. Nay, this prize jurisdiction appears, in some cases, to have been assumed and exercised by the legislative bodies themselves. And in the month of Brumaire an. IV, October, 1796, "La convention nationale voulant remédier à l'incoherence, et la variation, qui se remontrent dans les lois relatives à l'administration des Prises," issued a long decree, renewing and establishing many of the rules of the *Ordonnance de la Marine* of 1681, and of the *Reglement* of 1778. Still, however, the prize jurisdiction appears to have continued in an irregular state, till the institution of the *Conseil des Prises* in the eighth year of the Republic, chiefly through the growing, and even then great power of Bonaparte, as first consul. At the installation of the "*Conseil des Prises*," the minister of justice observed, "C'etoit une grande erreur, d'avoir attribué la connoissance des prises aux tribunaux. Quand il s'agit de la justice des nations, entre elles, quand il s'agit des droits de la guerre et de leur execution, quand il faut peser les traités, décider si une nation est amie ou neutre, menager avec sagesse, les interets des etats, on est étonné, sans doute, de voir intervenir une autre autorité, que celle du gouvernement."

On the same occasion, the President of the Conseil des Prises gave the following short account of the previous Republican legislation in this department. "Des lois impolitiques ont compromis pendant long tems, les interets de nos alliés et des Puissances neutres; de nombreuses armemens, qui commandoient l'interet, et le desir de nuire à un ennemi perfide et implacable, ont emmenés dans nos ports, indistinctement, amis et ennemis; les tribunaux, chargés de prononcer sur la validité des prises, n'ont vu, que la loi, et en ont sanctionné l'immoralité, sans égard pour le droit des nations. Nous sommes appelés, citoyens, par un gouvernement juste, et qui n'a besoin d'autre gloire, que celle, de pacifier la France, à déchirer les pages de cette legislation delirante." On the same occasion also, M. Portalis, in the character of Commissaire du gouvernement, thus concluded an eloquent speech: "Le Heros de la France, aujourd'hui Premier magistrat de la Republique, vient de placer ses Victoires et son nom, au dessus de l'envie en proposant la paix aux nations belligerantes, et en professant la justice envers toutes. L'Equité est la vertu des Empires. La moderation est la sagesse des grands etats; comme elle est celle des grands hommes. Nous avons étonné et ébranlé l'Europe, par l'eclat et la force de nos armes; il étoit tems de la rassurer par nos principes, et de la consoler, par nos vertus."

That the regard for justice and moderation, here so eloquently professed at the desire of the first consul, was a mere pretence, the subsequent conduct of Napoleon to the continental and maritime nations of Europe, sufficiently evinced; at the same time, there can be no doubt, that under the guidance of such an able and learned man as Portalis, the administration of Maritime international law was, at the close of the revolutionary war, much more correct and consistent with justice and

legal principle, than it had previously been from the commencement of that war. And yet this improved administration of Maritime international law by the Conseil des Prises, under the guidance of their enlightened adviser, differed only in one point, although that an important one, from the administration of that law by the English prize courts; and in that point the former was marked by greater severity than the latter.

Thus, in the course of its decisions, the Conseil des Prises recognized the legal validity of the following doctrines: the right to stop, visit, and search vessels at sea, for the purpose of ascertaining hostile property in vessel or cargo, or goods contraband of war; the right to confiscate, not only goods of that description, but also the vessels which carried them, if the contraband goods amounted to three-fourths of the cargo in value, under the Reglement of 1778, or to such a part as might be deemed sufficiently considerable in the estimation of rational and fair persons, under the law, 29 Nivose, Ann. VI. The right to capture and confiscate the goods of the enemy, found on board neutral vessels at sea, and even these neutral vessels themselves, for the period of six months, for which the conditional liberty of carrying hostile goods, was granted by the Reglement of 1778 to neutral vessels, had expired. And the law of the 23 Frimaire Ann. VIII, in abrogating the law of the 29 Nivose Ann. VI, left this matter to rest, upon the permission granted by the Reglement of 1778, or, as the period of that permission to neutrals had expired, consequently and ultimately upon the Ordonnance de la Marine of 1681, Liv. III. Tit. IX. Art. VII; which, as Portalis observes, in the case of the Caninholm, 29 Fructidor, Ann. VIII, p. 28, bears in express terms, "Tous navires, qui se trouveront, chargés d'effets, appartenant à nos ennemis, seront de bonne Prise." The same rule, too,

was the foundation of the subsequent decision of the Conseil des Prises, in the case of the Danish vessel *Lisguard*, 23 Vendemiaire Ann. IX.

But these very doctrines were then, and had been all along, recognized in the judicial practice of England, except the last; with regard to which, while the French held the carriage of hostile goods, sufficient to confiscate the neutral vessel, the English all along held the captor merely entitled to the confiscation of the hostile goods, and bound to pay the stipulated freight due to the owners of the neutral vessel.

Throughout the "Decisions du Conseil des Prises," there occur very frequent indications, not merely of greater moderation and liberality, than had been exhibited from the commencement of this maritime war, but also of a disposition to favour, and to cultivate the good will and friendly aid of neutrals. Thus, in the case of the Swedish vessel, *Quintus*, 16 Thermidor an. VIII, p. 5, Portalis observes, "Mais s'il y a des raisons, pour ne pas adjuger des dommages et interests, il n'y en a point, pour ne pas prononcer l'invalidité de la prise. Les principes du droit des gens, les égards, que l'on doit aux nations neutres, toutes les grandes considerations, qui naissent de la faveur, que l'on doit à la liberté de commerce general de l'Europe, nous font un devoir, de ne pas sanctionner une prise, qui tendroit trop ouvertement à compromettre cette liberté." But, however praiseworthy it may be, for the courts of international law, to administer that law with equity, fairness, and impartiality, neither the supreme judge of human actions, nor even the impartial spectator among mankind, can ascribe much merit to individuals or nations, who are liberal only in those matters, in which liberality has manifestly a direct tendency to protect or promote their own peculiar interests.

SPAIN.

In the course of the short period we are now contemplating, the administration in Spain of Maritime international law, during war, appears to have continued almost entirely the same, as described by the Chevalier d'Abreu. Not only the goods of the enemy on board neutral vessels were held liable to confiscation, but likewise the neutral vessels which carried these goods, unless it was provided otherwise by special treaty, as with France and the United Provinces; and with the exception of any permission to neutrals to carry hostile property, which may have been conceded for a short time, when the attempts to establish the system of armed neutrality, so much urged by the Empress Catherine, were to a certain extent renewed, goods, contraband of war, continued to be held not only liable to confiscation, but to subject, as good prize, the neutral vessels which carried them.

GREAT BRITAIN.

In the administration of Maritime international law, during the short, but important period we are now surveying, Great Britain appears to have persevered in the course she all along pursued. All goods which, from established usage or particular treaty, were declared contraband of war, were confiscated, and likewise the vessels which conveyed them, if belonging to the same owner; otherwise only the freight was forfeited. Goods, the property of the enemy, found on board neutral vessels at sea, continued as formerly, to be held liable to seizure as lawful prize; but the neutral vessel carrying these goods, was uniformly released, with payment to the neutral shipmaster of the stipulated freight. Of course, the stoppage and search of neutral vessels at sea,

was claimed and exercised, as indispensably requisite for the detection of contraband goods and hostile property. Vessels attempting to enter sufficiently blockaded ports, were condemned as lawful prize. Great Britain also continued to hold that neutral merchants were not entitled to interpose and assist a reduced or disabled belligerent, by carrying on the coasting or colonial trade of that state, from which they were excluded during peace, and of thereby directly deriving gain or profit, from and through the disputes of their neighbours. And the chief, if not the only other right of war claimed to be exercised by Great Britain, seems to have been, for a short time, the seizure, on payment of the price, of grain, flour, and other provisions, destined to French ports, or to ports occupied by the French, for the supply of their invading armies, in other words, the right of pre-emption.

This was the subject of the dispute, which unhappily arose between Great Britain and Denmark, in 1793. In consequence of the continental war, in which the revolutionary government of France had involved itself, or been involved, a large proportion of the industrious population was withdrawn from agricultural labour, in order to form, recruit, and maintain the large armies of the Republic; less grain, of course, was raised in France; and more was required for the subsistence of these increasing armies. To supply this want, the French government held out encouragement to neutral merchants to import grain and flour into France. On the other hand, Great Britain endeavoured to prevent this supply; and with this view, the instructions of June, 1793, to ships of war and privateers, were issued. But the British government were not, as represented by Azuni, *Droit Maritime*, T. II, p. 120, and by the younger Martens, *Causes Célèbres*, T. II, p. 324, either so cruel,

as to wish to starve women and children, or so foolish as to imagine, they could by famine, reduce the whole French nation to peace. What the British government aimed at, obviously was, to prevent supplies of provisions being carried to the French armies, who threatened to revolutionize the different European governments, and were then commencing that series of marches, which, in the course of the succeeding twenty years, terminated only at Madrid and Cadiz, at Vienna, Berlin and Moscow. And this the British government attempted to do, not by any breach of the common consuetudinary law of nations, as recognized in Europe, but by measures which they deemed consistent with that law. They did not, as in 1689, declare, by notification, all the ports of France in a state of blockade, although not surrounded by an adequate force. They blockaded certain ports with sufficient force; and vessels attempting to enter such blockaded ports, were, as admitted on all hands, legally confiscated with their cargoes. But the instructions of June, 1793, did not authorize the capture and confiscation of the cargoes of grain, which neutrals were then hastening to convey to France. These instructions merely authorized the British cruisers to intercept the vessels carrying such cargoes of grain or provisions, and to bring them into British ports, that the grain might there be sold, on account of the British government, for the behoof of the neutral proprietors, or might for that purpose, be carried to other friendly countries. The British government thus merely exercised the comparatively gentle right of pre-emption, to prevent such a supply being carried to those armies which were invading the territories of the adjacent continental states.

Accordingly, the Swedish government did not then complain of these instructions; but expressed satisfaction with them. And, notwithstanding his apparently ad-

verse disposition to England, the younger Martens observes, "Quoique cette indemnité annoncée par le gouvernement Britannique ne peut faire disparaître l'injustice fondamentale, d'une telle pretension, elle n'eut pas moins son plein effet par l'adoucissement, qu'elle apportait au commerce des nations neutres." *Causes Celebres*, Tom. II. p. 435.

But the king of Denmark, as guided by his able minister, Count Bernstorff, objected strongly to these instructions, founding not so much upon the general law of nations, as upon special treaties, namely, that of July, 1670, as explained by the convention of July, 1780, which expressly exempts grain from being held contraband of war; while by the treaties between Great Britain and Sweden of 1661, and 1666, money and provisions are expressly declared to be contraband. The complaint of Denmark on this occasion, is now less interesting, from its being founded, not upon the general law of nations, but upon particular treaties. And by the treaty of July, 1780, certainly, grain of all kinds, and provisions, are excepted from the list of contraband goods. But the instructions complained of did not infringe the treaty, by declaring such articles contraband of war, or authorizing the capture and confiscation thereof. They merely authorized the seizure and sale thereof, in British or other friendly ports, on account of the British government, but for payment of the price of the cargo to the neutral proprietor thereof, after payment of the freight due to the owner of the neutral vessel. This was very different, indeed, from including such cargoes in the list of contraband, or annexing the ordinary consequences of inclusion in that list. It was merely substituting a compulsory sale in the British territories, or other friendly countries, for the markets of France, where at that time, the demand for the com-

modity might be greater, and the price consequently higher. But it is to be regretted that the British government should have allowed itself to be provoked, or induced by the gross irregularities then committed by the French convention, and their menacing measures, subversive of all regular government and civil order, to deviate even to this small extent, from what may be called either the strictly literal, or the liberal interpretation of the old treaty of 1670, as renewed and confirmed by the treaty of July, 1780. According to the ordinary rule of the common consuetudinary Maritime law of nations, the neutral is entitled to carry his grain and other innocent commodities to the ports of the enemy, for the supply not merely of the women and children, (adverting to the absurd imputation and charge made by Azuni), but of the whole general population of the hostile country. And even the milder right of pre-emption, recognized since the days of Grotius, emerges only, when such grain, from its nature otherwise an innocent commodity, is destined to ports of military equipment, or to ports adjacent to military stations or positions, for the supply of land forces or armies.

But what chiefly distinguishes and elevates Great Britain, during this period, is the commencement, about the middle of it, by Sir William Scott, afterwards Lord Stowell, of that splendid judicial administration of Maritime international law, natural, consuetudinary, and conventional, hitherto unequalled in any other country. By the very distinct and lucid reports, published by Sir Christopher Robinson, of these most learned, able and impartial judicial determinations, the British administration of Maritime prize law was vindicated against the misrepresentation and obloquy of interested designing persons, and proclaimed in detail, to all neutral nations. And if neutral nations, chiefly oc-

cupied in the carrying trade, were dissatisfied with this administration, because it did not sanction their new, and for them very convenient rule of "free ship, free goods," so as to enable them to conceal the property, and carry on the coasting, colonial, and foreign trade of distressed belligerents, and thereby to counteract the warlike exertions of one of the opposed belligerents, they were at least distinctly informed, that to obtain such privileges, such deviations from the immemorial consuetudinary international law of Europe, they must have recourse to special treaty or convention.

The reports of the decisions in matters of prize by Sir Wm. Scott, as judge of the high court of admiralty, during the revolutionary war, occupy four volumes octavo; and embrace most of the debateable questions in Maritime international law during war. And these reports are so generally known on the continent, as well as in this country, that, in this historical sketch, it would be improper to do more, than shortly to notice the more important of these general points.

Indeed, Mr. Chitty, in his practical treatise, gave a pretty full abridgement of those reported decisions, arranged systematically; and our object in these researches, is not so much to repeat the doctrines of Maritime international law, thus already brought before the public, so far as founded on British authorities merely, but rather in addition to ascertain, whether the same doctrines have not also been approved of, and maintained by some of the ablest and most impartial recent foreign international jurists, as we have already done, in our account of the work of Lampredi; and as we intend to do in the sequel, by a notice of Jacobsen's mature opinion, and by a full analysis of the short, but profound work of M. Tetens. In the meantime, we return to the leading points determined, during the period we are surveying, as reported by Sir Chr. Robinson.

All trade with the enemy is illegal; except in virtue of special licences from government, which are of ancient practice, but are to be candidly obtained, and fairly used.

National character is to be ascertained from residence, occupation, official situation, &c.

Neutral territory; protection from; not to be violated by any acts of hostility.

Hostile goods found in neutral vessels at sea, liable to seizure and confiscation, but on condition of payment to the neutral of the stipulated freight.

When the coasting trade of the enemy is not open to neutrals during peace, it is illegal for them to carry it on during war; and freight not allowed.

When trade between the mother country and her colonies, is not open to neutrals during peace, their carrying it on during war, is illegal, and subjects both ship and cargo to confiscation. Relaxation in favour of neutrals, when the trade is not direct between colony and mother country.

In trade by neutrals, between the ports of allied belligerents; freight not allowed.

Goods contraband of war, liable to confiscation; such as arms, ammunition, and all warlike implements and stores. Other articles to be determined by circumstances, in the relative situations of the parties. Provisions not generally contraband; unless destined for military use, or the equipment of a fleet. Naval stores, such as pitch and tar, sail-cloth, timber for building ships, to be considered contraband, in maritime war only. According to former practice, contraband goods operated the forfeiture of the neutral vessel. Under the relaxation then established, they operated only the forfeiture of the freight, unless the owner of the neutral vessel was also owner of the contraband goods, or was privy to their shipment.

Stoppage, visitation and search of neutral vessels at sea, indispensable for ascertaining national character, property of vessels and cargoes, and description of goods as contraband or not, as destined for, and on account of, the enemy.

Resistance by convoy to search of neutral merchant vessels, a valid ground of condemnation.

Blockade; ought to be notified; must be actual, with sufficient force to deter the enemy. When violated, when not. General right of pre-emption, of provisions going to a hostile country. Prize ships are *bonâ fide* transferable to neutrals. But sales of ships, by enemies to neutrals, in time of war, must be absolute and indefeasible.

In recaptures, the rule in a question with neutrals, is reciprocity.

In captures made on the high seas, *Jure Belli*, the prize jurisdiction is vested in the prize courts of the country to which the captor belongs. Condemnation as prize, in the country of a neutral, is illegal. Condemnation in the prize courts of the country to which the captor belongs, is valid and effectual, though the captured vessel be lying in a neutral port.

Such was the administration of the Maritime law of nations during war, by Great Britain, from 1793 to 1801; very much a continuation in principle of the administration during the previous parts of the eighteenth century, with a relaxation in favour of neutral vessels carrying contraband goods, in holding the freight merely to be forfeited, and milder than the administration of the other great maritime states, France and Spain, which, with a temporary, and but short cessation in 1778, continued to confiscate vessels carrying hostile or contraband goods. But this administration of Maritime international law on the part of Great Britain, does not

appear to have suited the views either of the Dutch, while they maintained their independence of France, or of the more northern nations, and small states, engaged in the carrying trade. From perhaps natural, but obviously interested and partial considerations, they revived the doctrine of "free ship, free goods," which the Hanse towns had maintained and enforced in their own favour, when at the height of their power, as a confederacy, but which, in the decline of that power, they had been obliged to abandon. And the kingdoms of Denmark and Sweden, seemed now to maintain, as a legal right in their own favour, what they had refused to recognize, when claimed by the Hanseatic league.

Indeed, from the commencement of the general war in Europe, consequent upon the French revolution, the subjects of the northern smaller kingdoms and states, engaged in maritime commerce, and also, though to a less extent, the subjects of the smaller maritime kingdoms and states of the Mediterranean, evinced a strong disposition, not merely to protect and preserve the trade which they were accustomed to carry on during peace, but also to avail themselves of the changes effected by their reciprocal warlike operations, in the relative positions of the great belligerent nations, in order to encrease and extend that commerce. In all countries which have attained a certain degree of civilization, and advancement in commerce and manufactures, the desire of accumulating wealth by mercantile exchange, adventure and speculation, appears to be all-powerful, and to exercise such an influence, especially over the middle classes of the community, engaged in such operations, as not only to relax their moral feelings, but to induce them too frequently, to disobey even the injunctions of the sovereign power in their own states, and to violate the strict rules of justice, in relation to foreign nations.

Farther, the restraints to which neutral commerce is necessarily subjected in time of war, by the law of nations, as founded on justice, reciprocity, and general expediency, were, no doubt, greatly increased and aggravated by the unprecedented tyrannical mode in which it is admitted by the French themselves, prize law was administered during the existence of the Republic, prior to the establishment of the Conseil des Prises.

There accordingly appeared during this period, a series of *exparte* treatises by neutrals, complaining of the conduct of the belligerent nations; of which works some of the authors may have been animated by pure patriotic zeal, and resolution to resist what they believed to be injustice and oppression, but of which authors, the greater number appear to have been influenced by narrow contracted views of the interests of their own particular countries, or to have been actually the paid advocates of such doctrines, as neutrals deemed it convenient and advantageous to maintain. Not satisfied with retaining their accustomed commerce during peace, which is all they were entitled to, in justice, or international law, the merchants and ship owners of these neutral states, sought *lucrum captare alienâ jacturâ*, to benefit by the disputes of their neighbours, or by the necessity under which these neighbours felt themselves called upon, by warlike operations, to resist unjust aggression, or to enforce legitimate right. They sought to take advantage of the changes in the relative position of the belligerents, occasioned by the events of the war; and if one of the belligerents was reduced in strength at sea, by the exertions of his antagonist, they sought to carry on not only their own foreign commerce, as enjoyed by them before the war, but also in addition, to supply all the wants, and to carry on not only the general foreign trade, but also the colonial, and even the

coasting trade, of the vanquished belligerent, no longer able to carry on these different descriptions of trade for his own behoof. To accomplish this, the rule that the neutral flag covers all kinds of goods, was found quite convenient and sufficient for the purpose. And in support of the introduction of this rule, the *exparte* neutral writers undertook to show, first, that this rule had been adopted in a number of treaties, and was, therefore, a part of the European conventional law of nations; and, secondly, that the old rule, which held the goods of the enemy liable to capture at sea as prize, although found in neutral bottoms, originated in barbarous consuetude; while the result of civilization and refinement was the new rule, which assigned to neutral nations a right to unlimited freedom of commerce, as being a right far superior to, and not to be in any way, controlled or restrained, or limited by the right of nations to defend themselves by force, to maintain their independence, and to enforce their just claims by warlike operations.

Thus, in 1794, M. de Steck, a zealous, but partial, and not always correct supporter of neutral rights, in his "*Essais sur divers sujets relatifs à la navigation et au commerce pendant la guerre*," p. 144, appears to have thought he had sufficiently established the rule of "free ship, free goods," as, "*un principe du Droit des Gens Européen et moderne*," by showing, that a stipulation to that effect was first introduced in a treaty between France and the United Provinces, in 1646, in a treaty between France and England, under the Protectorate of Cromwell, and in a number of subsequent treaties; as if the very insertion of such a stipulation in these treaties, did not prove that it was not a principle of the natural, or general consuetudinary law of nations, but required to be supported by special paction. Such a stipulation, no doubt, rendered the rule binding upon

the contracting parties, as long as the treaty lasted. But when it terminated, the rule ceased to be binding even upon the contracting parties. And the circumstance of a nation having adopted, for a time, such a rule with one, can never bind it to adopt the same rule with another nation; and still less bind other nations, who have never entered into any such treaty.

In support of this rule, De Steck recognizes its counterpart, that neutral goods found on board a vessel of the enemy, are liable to seizure as prize, upon the general principle, that the property of the vessel, not of the goods on board, determines the property of the cargo. But for such an assumption or conclusion, there appears to be no foundation in fact, or legal principle. And both the rule in favour of neutrals, and its counterpart, which, although apparently against them, may be beneficial, in as much as it tends to secure the employment of their own vessels, seem equally absurd, as the decrees of the revolutionary convention of France, which, we have just seen, in its enmity to England, adopted the precisely opposite principle, and for a time established it as a rule against neutrals, that the property of the cargo should determine the property of the vessel, and that where the goods were English, or hostile, the vessel, though neutral property, should also be held to be hostile, contrary to the fact, and condemned as prize, accordingly.

Thus, too, in another part of his work, De Steck, adopting the views of the author of the "*Essai sur la liberté de la navigation et du commerce des nations neutres pendant la guerre*," published, as we formerly saw, in 1780, maintained that "*selon le Droit des Gens universel*," the navigation and commerce of neutral states is not in any way limited or affected, by the circumstance of other nations, either neighbouring, or with whom

they have habitual intercourse, being at war with each other, nor by the exercise of their competing rights of self-defence, preservation of their independence, or enforcement of reparation for injuries sustained. But in taking this *exparte*, or unilateral view of the rights of parties, De Steck merely revived the doctrine of the staunch advocates for neutral trade, Totze, Hübner, and Galiani.

On the same side with De Steck, Mumsen, a native of Hamburgh, published in 1799, a treatise, *De navibus populorum Belli tempore Mediorum, haud capiendis*. On the same side also, M. H. Bornemann, a Danish lawyer, published in 1800, at Copenhagen, a treatise, entitled, as translated into German, by C. F. Primon, "Über die Gebräuchliche Visitation der Neutralen Schiffe, und über der Konvoi." And in the same year, Professor Schlegel of Copenhagen, published a treatise, better known in this country, entitled, as translated into French, by M. de Juge, "Sur la visite des vaisseaux neutres, sous convoi." Farther, in 1801, Dr. M. A. Kopitz, published at Prague a treatise, entitled, "Kurze Darstellung des durch Russland im Jahre, 1780, gegründeten Systems der bewaffneten Neutralität."

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In the course of the year 1800, however, from views for which it is not easy to discover any adequate grounds, the Russian Emperor Paul, from being the ally and friend, suddenly became the foe of Great Britain. The governments of Denmark and Sweden likewise, supposed they had at this time, cause to complain of the conduct of certain British cruisers. And, with these three powers, Prussia also joined in a grand scheme, by military occupation on land, as well as by a combination of the naval forces of these states, to exclude the mercantile marine of Britain from the ports of the North Sea and Baltic, in the same way as the successes of the armies of the French Republic in the centre, and in the south of Europe, had already excluded it from Holland and the Netherlands, and from the ports on the north of the Mediterranean. In negotiation, the governments of Denmark, Sweden, and Prussia, alleged they had no intention of injuring Great Britain. But the embargo imposed by the Emperor Paul, on the British shipping and effects, in the Russian ports, contrary to the faith of treaties, which he had himself concluded, the shutting against England of the mouths of the Elbe, the Weser and the Ems, and the occupation of Hamburgh, Lubec, and even the electorate of Hanover, by Danish and Prussian troops, proved the apprehensions of the British government were too well founded. This new formidable northern confederacy assumed the appellation of "La nouvelle association Maritime pour le maintien de la navigation Neutre." And the British government saw the nation must either submit to the dictation of these northern powers, and consent to the establishment of the scheme of the armed neutrality of 1780, at least to surrender to neutrals the privilege of protecting the property of the enemy at sea, and of carrying on the coasting and colonial trade of the enemy, when himself

disabled from doing so by the events of the war,—or maintain their old legitimate rights single handed.

In support of these rights, and finding they had no alternative, the British government, in spring 1801, dispatched a fleet to the Baltic, commanded by admirals Hyde, Parker and Nelson. From the refusal of the Danish government to separate itself from the confederacy, and to allow the fleet to pass up the Baltic, in order to repel the unprovoked aggression of the Emperor Paul, the much to be lamented battle of Copenhagen became unavoidable. The result of this engagement, and of the nearly simultaneous death of the Emperor Paul, was the dissolution of the second northern confederacy. By the maritime convention of the 17th June, 1801, the succeeding Russian Emperor Alexander, released the British shipping, restored peace and amity between the two countries, and left entire the rights of belligerents to capture hostile property at sea, though on board neutral vessels, and to prevent neutrals from assisting the enemy, by carrying on for the enemy, when disabled from doing so himself, his coasting trade, and his direct colonial trade with the parent state. On the other hand, Great Britain agreed, that, with reference to Russia, the right of searching merchant vessels, sailing under convoy, should not be exercised by privateers, but only by ships of war. And to this convention, Denmark and Sweden were invited to accede; Great Britain agreeing to give up any prizes she had made, and to restore to these states, any dependencies she had conquered from them since the rupture. Charles de Martens *Nouvelles Causes Celebres*, T. II. p. 176—272.

The numerous *exparte* and controversial treatises and pamphlets, which appeared in Germany, and the other northern states, and also in France and Holland, from the commencement of the French revolutionary war,

till its termination in 1801—2, urging the pretensions of neutrals to an indefinite extent, as founded on the universal law of nations, or at least on an alleged recent and modern European conventional law of nations, naturally called forth similar controversial treatises in Great Britain; which, as the belligerent nation, superior at sea, had the chief interest to resist the pretensions now put forth by neutrals, as enabling them not only to protect the property, and carry on the foreign trade, but also to carry on the coasting and direct colonial trade of the reduced belligerent, and thereby to counteract, if not to defeat, the exertions made by Great Britain, for the enforcement of her unquestionable legal rights of self-defence against threatened invasion and revolution, from a foreign source. Professor Schlegel's work on the visitation of neutral vessels under convoy, received a very learned, acute, and able answer from Dr. Croke, advocate. And the continental works in support of the pretensions of neutrals, before noticed, appear to have induced Mr. Ward, whose history of the law of nations prior to Grotius, appeared in 1795, to renew his studies in international law, and to publish in 1801, two excellent treatises on "the relative rights and duties of belligerent and neutral powers, in maritime affairs." In these treatises, the opinions of Hübner and Schlegel are fully discussed. In the first, the author maintains, that neither by the law of nature, (of course, as applied to independent states), nor by reasons from authority and custom, nor so far as the question depends upon treaties, do "free ships, make free goods;" and, that, as little have neutrals any right to coast from port to port, or to trade from colony to colony, or from the colonies to the mother country of belligerents, without being liable to search and detention, except for contraband of war. In the second treatise, he maintains that goods contra-

band of war, are not confined to articles of exclusive and immediate use in war.

About the same time, in addition to the judgments of Sir Wm. Scott, in the English prize court of admiralty, there was published a full report of the judgment of the court of king's bench, in the case of Havelock against Rockwood, in a question between the owners of, and underwriters on a ship, in which it was determined, that a sentence of condemnation by an enemy's consul in a neutral port, is illegal and invalid.

As the different controversial treatises, before noticed, which appeared on the continent, and in this country, during the French revolutionary war, from 1793 to 1801—2, are comparatively of recent date, as the English works may be still procured, and as some of the works by Danes and Germans just alluded to, have been translated into English and French, it would be superfluous here, to give a more full account of them, or to repeat here, the lucid arguments of Mr. Ward, or the able judicial reasons assigned by Sir Wm. Scott. Such works require no commentary. And as, for the periods from 1756 to 1776, and from 1776 to 1793, we deemed it fairest, to give the opposite views of the questions, in which Great Britain is interested, and opposite arguments, as urged and maintained by jurists, unconnected with Great Britain, we shall endeavour to do so likewise, in the period we are next to survey, from the peace of Amiens, to the general peace of 1815.

Before concluding this Section, however, it may be proper to notice certain objections urged against the administration by Great Britain, of Maritime international law, during the earlier part of the period we are now surveying, prior to the appointment of Sir Wm. Scott, as judge of the admiralty prize court. And this notice is the more requisite; because the ob-

jections proceed not from any *ex parte* interested controversial writer, but from M. Schoell, in his excellent recast and continuation of M. de Koch's *Histoire abrégée des Traités de Paix entre les Puissances de l'Europe*, published in 1817, part of which we shall afterwards have occasion to review. These objections relate not only to the proceedings of the British naval force under the order in council of the 8th January, 1793, authorizing the seizure of the cargoes of grain in neutral vessels destined for the ports of France, upon the ground of the right of pre-emption, but also to the proceedings of the British prize courts, as partial and dilatory, and of the government itself, in not giving effect to the judgments of these courts, when favourable to neutrals.

Thus p. 30—31, vol. VI, "Les armateurs Anglois n'etoient pas gens à executer avec mollesse les ordonnances sévères de leur gouvernement. Dans le peu de mois, qui s'écoulèrent entre le commencement des hostilités, et le 15 Août 1793, cent quatre-vingt-neuf bâtimens Danois chargés de grains, de viande, de poissons, &c. furent conduits en Angleterre; mais le gouvernement Britannique fut très lent dans le paiement des cargaisons, qu'il s'etoit ainsi appropriées. Des 557, 504 Liv. sterl., auxquelles elles avoient été estimées, il n'avoit payé, en Novembre, 1794, que 38, 407l. 13sh. sterl. Dans l'intervalle les tribunaux d'amirauté Anglois etablirent une maxime nouvelle, d'après laquelle les nations neutres n'avoient pas le droit de porter dans des pays étrangers les produits et marchandises, d'autres nations, chaque nation devant se borner au commerce de ses propres productions. D'après ce principe, qui dès-lors forma préjugé (precedent) dans les tribunaux, on refuser à divers bâtimens neutres le paiement du prix de leur cargaison et du fret."

"Les Anglois ne continuèrent pas seulement à exé-

cuter avec rigueur leur règlement du 8 Juin, 1793; mais l'amiral Hood, qui commandoit leur flotte dans la mer Méditerranée, renchérit même arbitrairement sur cette rigueur, en déclarant de bonne prise tout bâtiment, de quelque nation qu'il fût, destiné pour un port françois, ou sorti de là, sans égard à la nature de sa cargaison."

" Les tribunaux Anglois, dont dépendoit le jugement des affaires de prises, ont été si généralement accusés de partialité, et les faits sur lesquels ce reproche est appuyé paroissent si évidens, qu'il est difficile de les absoudre entièrement de ce reproche. Dans tous les cas, le tribunal, de l'amirauté de Londres, ou Sir James Marriott qui pendant plusieurs années le présida, ne sauroit être excusé de la lenteur, ou plutôt de l'inertie qui a causé des pertes irréparables aux negocians des états neutres. Le gouvernement Anglois lui-même n'est pas à l'abri du blâme relativement à la manière, dont il réalisoit les paiemens auxquels ses propres tribunaux le condamnoient." Tom. VI. pp. 30, 31, 36, 41, 42.

Now, certainly, it is neither the object nor design of this work, to support the conduct of the British government or prize courts, or of the British naval forces, in any acts of injustice, or irregularities, inconsistent with the principles of the maritime law of nations. The right of pre-emption we have maintained to be competent to belligerents in relation to neutrals, in certain cases, as, with regard to cargoes of grain or other provisions, though not usually held contraband of war, but innocent in their nature, when found in transitu, destined to the ports of an opposed belligerent, and directly applicable to the subsistence of his land or marine forces; it being always understood that the neutral owner of the cargo is to receive the market price of the articles stopped in transitu, and the owner of the neutral vessel his stipulated or accustomed freight. Indeed, we have seen,

that in 1793, Sweden admitted the existence of this right, and Count Bernstorff, on the part of Denmark, objected to it only on the ground of special treaty. If the British government failed in making, or unduly delayed to make, payment of the market price of the cargoes of grain intercepted under the order of council, it acted unjustly. But this assertion is denied by the British government; and while we have no means of ascertaining how the fact stands in individual cases, we cannot assent to the correctness of the information on which the independent and comparatively impartial M. Schoell has here proceeded. On the contrary, it appears, that beside the market price of the cargoes of grain, the neutral owners were by a rule of the British admiralty court, held entitled to recover, and did recover the expenses of the judicial proceedings, provided there was no falsification of ship's papers, and provided the original evidence afforded proof of actual neutral property. *Minerva*, 15th January, 1800. *Rob. Adm. Rep.* vol. II. p. 302.

As little are we disposed to support, or attempt to justify any defect in Sir James Marriott, as a judge, in point of partiality, or dilatory procedure, if the neutral allegation be really founded in fact. He was certainly a very inferior judge, in most respects, to his successor Sir Wm. Scott; and the government of a nation incurs a degree of blame, in the appointment of any person, who may not be well qualified for the right discharge of the duties of such an important judicial office. But it is believed, that, if Sir James Marriott erred in any of his judgments, the error arose, not from any individual partiality, but from excessive patriotic zeal, to the almost insensible influence of which, so many, acting *bonâ fide*, are liable; and any such errors, if they occurred, might be easily corrected by an appeal to the supreme prize court.

The charge, however, against the English prize courts, of having adopted at that time, a rule of practice, inconsistent with the principles of Maritime international law,—such as, that neutral nations have no right to carry to foreign belligerent countries, the produce and merchandise of other nations; each nation being limited to the commerce of its own productions—is more grave and serious; and we conceive, it is an error, in point of fact, on the part of M. Shoell, not intentional, but from misinformation; as we cannot discover, that any such maxim, or general rule, was then, or at any time recognized in the judicial practice of England.

In treaties—in the conventional law of nations, properly so called,—a distinction indeed has frequently been made, between goods, the produce of the country of the proprietor, and goods, the produce of other countries, natural or artificial. But in Maritime international law, natural and consuetudinary, not depending on treaty, this distinction occurs, and is chiefly, if not solely, applicable to particular questions, regarding goods, which are not from their nature, or artificial adaptation, instruments of war, or directly subservient to the purposes of hostility, such as articles of human food; and are therefore not held in general to be contraband, but to become so, only from destination to ports where they are directly applicable to provisioning a hostile fleet, or subsisting land forces. In such cases, the distinction has been introduced, not against, but in favour of neutrals, as the ground of a relaxation, in consequence of it having been deemed a harsh exercise of a belligerent's right, to capture as prize, those articles which constitute a considerable part of the native produce and ordinary commerce of a neutral country. Rob. Adm. Rep. *Die Jonge Margaretha*. 5 Feb. 1799. Vol. I, p. 191. And such a distinction does not appear to have

been established by the British prize courts, either during the period referred to by M. Shoell, or at any other time, to the effect of confiscating articles not contraband from their nature, or adaptation, or destination, for the purpose or support of hostilities, merely because they were not the produce of the country of the neutral owner. Dutch cheeses, purchased by a neutral, and captured in a neutral vessel, on a voyage from Amsterdam to Brest, were, no doubt, confiscated at a later period during this war; but they were so confiscated, not merely because they were the product of another country than that of the neutral owner, but because, being the ordinary provisions used in French ships of war, they were destined for a hostile port of naval equipment, and because it was inconsistent with the legal duty of a neutral, to carry the surplus produce of one enemy, to supply what was the usual food of the crews of the ships of war of another enemy, in alliance with the former belligerent.

SECTION III.

It remains to notice the state of conventional Maritime international law, properly so called, as composed of old subsisting, or newly entered into treaties, during the period from 1793 to 1801. This, indeed, we have so far anticipated, in referring to the treaty between the Russian Empress Catherine and Great Britain, in 1793, and the treaties of the Russian Emperor Paul, with Sweden, Denmark, and Prussia, of which the object was a revival of the scheme of the armed neutrality.

By concluding with Great Britain, the convention of March, 1793, and thereby reverting to the treaty of commerce of 1766, the Empress Catherine virtually

abandoned her scheme of the armed neutrality, and agreed, that the reciprocal intercourse of national ships of war, or privateers, and merchant vessels meeting at sea, should be regulated à l'usage, in other words, according to the consuetudinary Maritime law of nations, as observed in Europe, in 1766. Martens' *Recueil des Traités*. Tom. V. p. 108—114—119. And by the convention of June, 1801, between the Russian Emperor Alexander, and Great Britain, and the acts of accession thereto, by Sweden and Denmark, we have seen, the declaration and conventions of the Russian Emperor Paul, with Sweden, Denmark, and Prussia, for the revival of the armed neutrality were completely done away; and matters were left to rest on the footing of the Maritime consuetudinary law, with the exception in favour of Russia, that the right of search should be exercised against merchant vessels sailing under convoy, only by national, or government ships of war. Martens' *Recueil*, Supp. Tom. II. p. 476.

Thus the plan of the armed neutrality, which originated with Russia, which was supported by treaties procured through the influence of that power, and which was all along rested by its advocates on the conventional law of nations, properly so called, terminated in the same mode, and by the same authority, in and by which it was created. And it has not been revived by any subsequent treaties or conventions. But there still remains for farther consideration during this period, that pretended new, or modern system of Maritime international law, which protects hostile property in neutral ships, and confiscates neutral property, when found in hostile vessels, and which is alleged to rest on a broader and more durable foundation, than the Russian declaration and conventions, thus done away by subsequent arrangements. But this alleged new system, it is plain, must

rest either upon treaties or conventions, binding the contracting parties, or upon common consuetudinary law, as so far at least, carrying into effect the rules of the natural law of nations, or upon that natural law itself, as the aggregate of the principles of justice, impartial reciprocity, and general expediency, applied to civil societies, or the communities of men called states, in their intercourse with each other, in the circumstances in which they are placed on the face of this globe.

Now, first, with regard to treaties, as contracts, binding on the parties to them, those of the latter half of the seventeenth century, as renewed, confirmed, or continued by subsequent treaties, appear to be mainly founded on by the advocates of the new system of Maritime international law. But, with reference to the treaties of the seventeenth century, concluded between England and Holland, particularly those of 1667 and 1674, and the subsequent treaties which renewed and continued the stipulation in these older treaties, in favour of neutral vessels being allowed to cover the goods of the enemy, the States General themselves, in 1780, refused, or when required, failed to fulfil the other more important counter engagements in these more recent treaties. And thereupon the government of Great Britain formally announced, in April, 1780, that the Republic had thereby deserted the alliance which had so long subsisted between the nations, and placed itself in the situation of neutral powers, who are not connected with Great Britain by any treaty, and that, therefore, the particular stipulations calculated to favour, in time of war, the navigation and commerce of the subjects of the States General had ceased to be obligatory. Martens *Recueil*, Tom. II. p. 76. Nor does it appear that these privileges were again conceded to Holland by the treaty

of peace of 1784, or by the treaty of 1788, or were ever enjoyed by Holland during the French revolutionary war, for the short period before the Republic became in reality a province of France.

With regard, again, to the treaties of the seventeenth century, between Great Britain and France, chiefly in the reign of Charles II, and the later treaties, such as that of Utrecht, in 1713, particularly founded on, by which the parties may have mutually engaged to allow the neutral vessel to cover a hostile cargo, Great Britain had no occasion to justify the refusal longer to concede such conventional privileges, by the failure of the opposite contracting party, to fulfil the counter stipulations contained in these treaties. For the national convention of France, in March, 1793, formally announced to the nations of Europe, that it had annulled all treaties of alliance and commerce with the powers with whom it was then at war. *Martens Recueil des Traités*. Tom. VI. p. 444.

So far then as regards the scheme of the armed neutrality, or what some continental writers of the present times, seem to like better, the new, or modern system of the Maritime international law of Europe, as far as its advocates may have rested, or may rest it, on conventions or treaties, it has, if not entirely, been, in a great measure, abandoned, and done away, by the very states which gave it birth. But, although, in all probability, aware of this fact, the promoters of this modern system of law, as it is called, while they admit it originated and derived all its force from treaties, nevertheless seem to maintain it has somehow or other, independently of these treaties, and even although they have expired, acquired and attained a force which makes this modern system, a constituent part, if not of natural, at least of the positive law of nations. Now, how could, or can this be accomplished?

It is very true, that a variety and a succession of treaties embracing the same points, will afford evidence of an agreement upon such points, in contracting, and a habit of contracting in such modes. But a habit of fixing certain points by a contract, however varied or continued,—an undertaking by contract to perform, or abstain from certain actions, however frequently repeated, can merely imply or infer a consent or obligation, so to perform or abstain in the same, or similar circumstances, namely, by contract. It can never imply, or afford ground for inferring a consent, or undertaking so to perform or abstain, without such contract, and in relation to all and sundry, whether contracting parties, or not.

Such, however, appears to be the theory of the advocates of what is called the modern Maritime international law of Europe; namely, to extract from, and to establish by special treaties and conventions, those doctrines, for which they could not discover a foundation in the external reciprocal juridical relations of nations, as separate independent states, whether in a rude, or comparatively civilized condition. And, as elsewhere observed, to this scheme of the advocates of particular national interests, the authors of two of the most recent and best treatises on the general law of nations, Martens and Klüber, have, perhaps, given too much encouragement by expounding the conventional international law of Europe, not so much as what it really and properly is,—by giving a scientifically, or philosophically arranged exposition of the different doctrines of international law, as agreed upon, and so far recognized by the different nations, in their particular conventions, binding on the contracting parties, to the extent, and for the duration thereby fixed;—but by endeavouring to create, out of these treaties, a system of doctrines, which shall be held bind-

ing perpetually, or for an indefinite period, not only upon those who actually entered into such engagements, in relation to other contracting parties, but also upon those nations, who may have merely entered into such engagements with particular nations, in relation to all other nations, although different from the opposite, or reciprocally contracting parties, and even upon those who have never entered into any such engagements at all. Such an artificial system, it is plain, cannot consistently with correct legal principle, have any validity against nations, who never entered into any such engagements, or against nations, who, for particular considerations, may have for a time entered into similar engagements, but who never consented, or intended to enter into such engagements, in perpetuity, with all the rest of mankind, indiscriminately, or with other nations, than the contracting parties, however different in character, or differently situated.

But not only is this pretended modern system of Maritime international law, by which the neutral vessel is held to protect from hostile seizure, the goods of the enemy, and by which the hostile vessel is held to confiscate neutral goods, contrary, as we have seen, to the common consuetudinary Maritime law of nations, which had prevailed in Europe for centuries preceding; not only was it confessedly first introduced during the latter part of the seventeenth century, by special conventions or treaties, between particular nations; not only have these and the subsequent treaties, which continued, or renewed them, been, in a great measure, if not entirely departed from, altered, annulled, or dissolved; not only is it vain, if not absurd, to attempt to extract out of, and to rear upon these expired, or abandoned, or annulled treaties, a perpetual and universal law, to which these contracting parties never consented,—it will also be found, upon in-

vestigation, that the two leading maxims of which this new system consists, have no foundation in reason or justice, or in the natural law of nations.

For, in the first place, if the maxims be compared with each other, the rule of this pretended modern Maritime law of nations, that "free ships make free goods," and the other new rule, which, it is alleged, has been introduced along with it, and forms part of this modern system, "that unfree ships make the cargoes unfree," or subject the cargoes to confiscation, are manifestly both inconsistent with established legal principle, because they ascribe property to temporary possession, for the mere purpose of conveyance; and are equally inconsistent with each other, because the one protects, and the other confiscates neutral property, without any difference in fact, or legal right.

In the second place, if the maxims be considered separately, what can be more contrary to the natural feelings of justice, than the second rule, of which this system is composed, to confiscate the goods of a neutral, a friend, shipped on board the vessel of his friend, a foreigner, because that foreigner happens to be our enemy!

Indeed, scarcely any writer has ventured to maintain that this rule is either just, or consistent with the natural law of nations; although it may have been the rule, exacted and imposed, or mutually agreed to, by the parties in particular treaties, or adopted by the government of his own country. And truly, this adjunct appears to have been introduced, merely as a set off, to cover the fallacy of the first rule.

But the first rule also, of this system, which gives to neutrals the privilege of protecting from seizure, the goods of the enemy, to the effect of preventing another nation from using the means afforded it by nature, for compelling that enemy to do it justice, concedes to neu-

trals, what no people has a right to exact from another, and is equally partial, and destitute of foundation in the natural law of nations; whether it be considered with reference to the fact,—the circumstances necessary to the existence or emergence of rights, or with reference to the general principles of legal justice.

In point of fact, this first rule of the new system, is a mere *Fictio Juris*; whereas, fictions are acknowledged by the most eminent international jurists, to be unknown and inadmissible in the natural law of nations. It goes upon a hypothesis, or supposition, inconsistent with physical fact, with the actual state of matters on the face of this globe, upon which all human law, all rights and obligations, susceptible of enforcement, must, and do proceed. It assumes, contrary to the fact, that a merchant vessel, a boat, or even a piece of cloth, a flag in the open sea, or wide ocean, are physically identical with, or equivalent to, and ought to be viewed in the same light, and to have the same practical effect in law, or in that branch of morals which admits of physical enforcement, as a portion of a continent, an island, or fixed and stable land, occupied by a tribe, a community, a people or nation, as its territory.

Again, this first, and grand rule of the new system is a fiction, inconsistent with fact, inasmuch as it presumes and holds goods to be neutral, which are actually hostile. It holds that the national character and property of the goods shall be determined, not by the quality or condition of the goods themselves, but by the quality or condition of the vehicle, in which they happen to be conveyed. And in logic, it is as absurd, as its converse, contained in the decree, which was issued by the French revolutionary convention in its enmity to Great Britain, and which declared, that the national character and property of the vessel should be determined, not by the

quality or condition of the vessel itself, but by that of the cargo.

In point of legal principle, it does not appear that the maxim "free ship, free goods," can become the subject of a fair and equal bilateral contract between two parties. At least, it is obviously dependent for its fairness and equality, upon the consent and conduct of another nation, not a party to the treaty, namely, the nation, who may eventually be opposed as a belligerent, to one of the contracting parties. For, unless this eventual opposed belligerent shall adopt the same maxim, the treaty of alliance, though not quite a *Societas Leonina*, will be very unequal. The one contracting party who remains neutral, will obtain all the advantage of the carrying trade of the opposed belligerent, who does not adopt the rule; and the other contracting party who goes to war with that third nation, will have his military operations against that belligerent materially restricted and cramped, by the permission he has given to the first contracting party, who remains neutral, to undertake the carrying trade of the opposed belligerent. And, accordingly, the non-adoption of the maxim by this third party, appears to have been made the ground, or excuse, for the non-observance of the stipulation in the treaty.

In point of justice and reciprocity, as a general rule, without stipulation or convention, this maxim is partial and unjust, because it deprives one of the nations of the use of the means afforded by nature, for maintaining its self-defence and independence, for enforcing its undoubted rights, and protecting its various interests, by counteracting and preventing the effects which its military operations would otherwise have produced.

Again, this *exparte* convenient maxim, is inconsistent with a more general and primary principle of all law,

whether the internal jurisprudence of states, or international law, according to which, in the collision of rights, which so frequently occurs in human affairs, the inferior, less important, and less necessary right, must yield to the higher, the more momentous, and the more urgent or necessary right.

Farther, this maxim is inconsistent with a primary principle in all law, according to which, a right which admits of valuation, and of adequate, or nearly adequate reparation or compensation for the non-exercise thereof, is suspended or postponed, to admit of the exercise of a right, the non-exercise of which is productive of indefinite loss or damage, which cannot be physically estimated, or adequately compensated.

Again, this maxim is inconsistent with a general principle recognized in the laws of all nations, which have made any advancement in civilization; "*Bono et aequo non convenit, aut lucrari aliquem cum damno alterius, aut damnum sentire, per alterius lucrum.*" It is not consistent with justice and equity, that any one should gain through the loss of another, or suffer loss, that another may thereby reap a profit.

Finally, it seems doubtful, whether this maxim of "free ship, free goods," for the adoption of which neutrals have so long struggled, be really, upon the whole, advantageous for themselves. By its adoption, they secure the carrying trade of the opposed belligerent,—the "commerce de fret," during the war. But upon the return of peace, the belligerent nation soon resumes its ordinary share of that trade. On the other hand, under the old rule of the common consuetudinary law, the belligerent nation cannot maintain its own proper trade, or exchange of its own commodities, by means of the safe conveyance afforded by neutral vessels, under the proposed new rule. And neutrals, upon war breaking

out, have thus an opportunity of obtaining a considerable share of the proper or peculiar national trade of either belligerent, and the probable prospect of retaining it longer, when once acquired, from the investment of neutral capital in it, than the mere carrying trade.

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